No. 92-259-CFX
Status: GRANTED

Title: Oklahoma Tax Commission, Petitioner
v.
Sac and Fox Nation

Docketed:
August 10, 1992

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Miley,David Allen

Counsel for respondent: Rice,William

081192 Ck rec'd

Entry	Date	Note	Proceedings and Orders
1	Aug 10 1992	G	Petition for writ of certiorari filed.
2	Sep 8 1992		Brief of respondent Sac & Fox Nation in opposition filed.
3	Sep 16 1992		DISTRIBUTED. October 9, 1992
4	Oct 7 1992		REDISTRIBUTED. October 30, 1992
5	Nov 2 1992		REDISTRIBUTED. November 6, 1992
6	Nov 9 1992		Petition GRANTED.
			**********
7	Dec 17 1992		Brief of petitioner Oklahoma Tax Commission filed.
17	Dec 17 1992		Joint appendix filed.
8	Dec 28 1992		Brief amici curiae of Arizona, et al. filed.
9	Dec 28 1992		Brief amicus curiae of United States filed.
11	Dec 30 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Tenth Circuit.
10	Jan 5 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
12	Jan 11 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
13	Jan 21 1993		Brief amici curiae of Assiniboine and Sioux Tribes, et al. filed.
14	Jan 21 1993		Brief of respondent Sac & Fox Nation filed.
15	Jan 21 1993		Brief amici curiae of Cheyenne-Arapaho Tribes of Oklahoma, et al. filed.
16	Jan 21 1993		Brief amici curiae of Navajo Nation and Pueblo of Laguna filed.
18	Jan 21 1993		Brief amicus curiae of Choctaw Nation of Oklahoma filed.
20	Feb 4 1993		CIRCULATED.
21	Feb 5 1993	X	Reply brief of petitioner filed.
19	Mar 3 1993		SET FOR ARGUMENT TUESDAY, MARCH 23, 1993. (3RD CASE).
22	Mar 12 1993		Record filed.
		*	Certified proceedings United States District Court for the Western District of Oklahoma.
23	Mar 16 1993		Letter from the Solicitor General received and distributed.
24	Mar 23 1993		ARGUED.

92-259

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

OKLAHOMA TAX COMMISSION, *PETITIONER,*

V.

SAC AND FOX NATION, *RESPONDENT.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Whether Sac and Fox tribal members who are employed by the Sac and Fox Nation are subject to Oklahoma income taxes on their wages earned from tribal employment.

2. Whether Sac and Fox tribal members who register their motor vehicle with the Tribe and buy a tribal license tag, thus become exempt from:

   a. The payment of Oklahoma motor vehicle excise taxes imposed on the tribal members' purchase of the vehicle, or

   b. Registering and licensing their vehicles under State law for use upon State roads & highways, and paying State license and registration fees imposed by State law.

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IN THE

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SAC AND FOX NATION, *RESPONDENT.*

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioner, Oklahoma Tax Commission, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 16, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at _____ F.2d _____, and is reprinted in the appendix hereto, page A-1, infra.

The Order of the United States District Court for the Western District of Oklahoma (Alley, D.J.) has not been reported. It is reprinted in the Appendix hereto, page A-9, infra. The Order of the District Court on rehearing is not reported and is reprinted in the Appendix at page A-14, infra.

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was entered on June 16, 1992. No petition for rehearing was sought. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The Federal jurisdiction of the District Court was invoked under 28 U.S.C. 1362 because the Respondent below is a federally recognized Indian Tribe.

STATEMENT OF THE CASE

1. Nature of the Controversy.

This case involves the Oklahoma Tax Commission's enforcement of State income taxes upon Sac and Fox tribal members who are employed by the Tribe and work primarily on Indian country within Oklahoma and the collection of the State's motor vehicle excise taxes and licensing and registration fees upon tribal members vehicles used upon the State's roads and highways.

The Sac and Fox Nation is a federally recognized Indian tribe located within the State of Oklahoma, which is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. 501 et seq. The offices of the tribal headquarters are located near Stroud, Oklahoma, on a quarter-section (160 acres) excepted from operation of the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749, and is held in trust by the United States Government for the benefit of the Tribe. Within the area of the former Sac and Fox Reservation in central Oklahoma, the United States also holds other tracts of land in trust for the Tribe or its members. These tracts vary in size from a few acres to 640 acres and are not contiguous but are randomly scattered throughout the area among land that is otherwise within the jurisdiction of State government. The tribal trust land constitutes Indian Country as that term is defined in 18 U.S.C. §1151, and is within the jurisdiction of the tribal government. The Tribe employs both tribal members and nonmembers at its headquarters who primarily perform their duties on Indian Country at the headquarters building but may perform some duties off of Indian Country. Some employees of the Tribe may live on Indian Country and some employees do not live on Indian Country but no one resides at the tribal headquarters.

The Tribe imposes an income tax on both members and nonmembers who are employed by the Tribe. The Tribe also imposes taxes on motor vehicles owned by any person or entity which are principally garaged on Indian Country under the jurisdiction of the Sac and Fox Nation. The Oklahoma Tax Commission does not challenge the Tribe's right to impose these taxes, but claims that the tribal members and nonmembers are also obligated to pay State income and motor vehicle taxes pursuant to State law, regardless of whether or not tribal taxes have been paid by those individuals.

The State imposes an income tax on all residents and nonresidents who receive income in Oklahoma pursuant to the Oklahoma Income Tax Act, 68 O.S. 1991 §2351 et seq. All tribal employees, whether tribal members or nonmembers, or any person who receives income for employment or work performed on Indian Country or elsewhere within Oklahoma are subject to pay Oklahoma income taxes. The State does attempt to assess and collect the income tax from such persons if they fail to report their income and pay those taxes.

The State also imposes a motor vehicle excise tax on the transfer of ownership or use of a motor vehicle in this State pursuant to the Vehicle Excise Tax Act, 68 O.S. 1991 §2101 et seq., and the State imposes an annual registration fee on the owners of every vehicle operated upon, over, along or across any avenue of public access in this State pursuant to the Oklahoma Vehicle License and Registration Act, 47 O.S. 1991 §1101 et seq. The Commission enforces the motor vehicle tax when a person, who had purchased a tribal license for their vehicle, subsequently sold that vehicle. The subsequent owner of the vehicle is required to pay the delinquent back taxes on the vehicle for the years the vehicle was tribally licensed in order to obtain an Oklahoma title and license plate for the car. The Commission will not issue a title on the basis of the previous owner' tribal title because the Commission contends that the State taxes are properly due and owing for that period.

2. The Proceedings Below.

Because the Commission had assessed tribal employees for income taxes on wages from tribal employment and had required that delinquent motor vehicle taxes be paid for the period a vehicle was tribally licensed when the vehicle was sold, the Tribe brought an action against the Commission in the United States District Court for the

Western District of Oklahoma to enjoin the Commission from enforcing the State income and motor vehicle taxes against its tribal members and others. The jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the Respondent is a federally recognized Indian tribe.

The District Court entered its Order on April 17, 1991, disposing of the litigants cross-motions for summary judgment. This Order is reprinted at page A-9 in the Appendix. The District Court found that the State should be enjoined from enforcing income taxes against wages earned by tribal members from tribal employment but that nonmembers employed by the Tribe were subject to State income tax.

The Court also enjoined the State from enforcing its motor vehicle taxes against a tribal member who properly licensed the vehicle with the Tribe by requiring the payment of the delinquent back taxes when the vehicle was sold. However, the injunction only extended to tribal members who own vehicles that are primarily garaged on trust land and licensed by the tribe of which they are members. Nonmembers of the tribe were required to pay all applicable State motor vehicle taxes. The District Court denied the motions for rehearing filed by each party, see Order at page A-14.

Both parties appealed this decision to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit's opinion, reprinted at page A-1, affirmed the decision of the District Court. Both the Tenth Circuit and the District Court declined to reach the issue of the extent of the Sac and Fox Reservation or whether the Reservation had been disestablished and refused to enter the required individualized treatment of particular treaties and specific federal statutes as they affect the respective rights of States, Indians, and the Federal Government, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Instead, the lower courts concluded that under the authority of *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), tribal members in any circumstances employed by the Tribe are not subject to State income taxes and pursuant to this Court's opinion in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), those tribal members were not responsible for State motor vehicle taxes either.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit Court of Appeals has rendered a decision

which is in conflict with applicable decisions of this Court by enjoining the State from enforcing its tax laws or collecting its taxes against the individual tribal members in this case. The Appeals Court misconstrued the holding of this Court in the *McClanahan* case and opined that the tribal members' wages earned from tribal employment were per se exempt from State income taxes. This exemption was not drawn from any language or holding in the *McClanahan* case but instead was constructed from what the Appeals Court called the "essence" of the decision. The Tenth Circuit ignored the decisions from this Court which hold that the income of Indians in Oklahoma is taxable as well as those parts of the *McClanahan* opinion that oppose the Tenth Circuit's theory of the case.

The Appeals Court likewise miscast this Court's decision in *Colville* regarding the exemption from motor vehicle taxes. Again, the Appeals Court held that tribal members were not required to pay motor vehicle taxes as a per se rule rather than consider the particular circumstance of these individuals and balance the interest of the Tribe against the interests of the State in order to determine whether these individuals were entitled to an exemption. As a result, the Tenth Circuit misapplied the authority of the *Colville* case to the facts of this case and created an exemption where none existed before. Because the Tenth Circuit has decided a federal question in conflict with applicable decisions of this Court, review by this Court is urgently required.

I. THE TENTH CIRCUIT'S OPINION WHICH EXEMPTS TRIBAL MEMBERS FROM STATE INCOME TAX ON TRIBAL WAGES IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The Tenth Circuit concluded that this Court's decision in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), entirely disposed of the issue in the Tribe's favor of whether the tribal members in the case at bar were liable for State income taxes. After reaching this conclusion, the Tenth Circuit stated, "It would serve little purpose to retrace the *McClanahan* analysis here." The Tenth Circuit's failure to enter any analysis of this case is the reason why the opinion is in conflict with the decision of this Court upon which the Appeals Court relies.

Contrary to the Tenth Circuit's opinion, the Commission sub-

mits that the *McClanahan* decision strongly supports its position that tribal members who work for the Sac and Fox Nation are properly subject to State income taxes. In *McClanahan*, this Court began its analysis with the relevant treaty. In comparison, the Tenth Circuit stated in footnote 2 of its opinion that, "The focus in this type of case is tribal immunity from state jurisdiction." However, this Court has stated at 411 U.S. 172:

> [T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption...The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power...The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. (citations omitted)

Therefore, this Court began its analysis in *McClanahan* with the treaty which the United States Government entered with the Navajo Nation in 1868. This Court found that the treaty nowhere explicitly states that the Navajo's were to be free from state law or exempt from state taxes, however, the reservation of certain lands for the exclusive use and occupancy of the Navajo's and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. Therefore, this Court's interpretation of the Navajo treaty precluded the extension of any State law to Indians on the Navajo reservation.

The case at bar has no such basis upon which state laws can be pre-empted. Pursuant to the Treaty with the Sacs and Foxes, February 18, 1867, 15 Stat. 495, the United States agreed in Article VI of the Treaty to "give to the Sacs and Foxes for their future home a tract of land in the Indian Country South of Kansas, and South of the Cherokee lands, not exceeding seven hundred and fifty square miles in extent."

The Sac and Fox Reservation was granted to the Tribe in exchange for cessions of tribal lands in other states from which the Tribe was being removed. The United States also agreed to pay a dollar an

acre for the ceded lands plus all outstanding indebtedness of the Tribe. In contrast to the Navajo treaty, the Sac and Fox Nation was not returning to their permanent home in a portion of what had been their native country in return for promises to keep peace. Rather, the Sac and Fox treaty reads more like a land deal.

But more important than that is the fact that the Sac and Fox Treaty was superseded by the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749. This is a fact that did not occur in *McClanahan*. Under this Act the Sac and Fox Nation cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to the reservation. The Act provided that the quarter section of land where the Sac and Fox Agency is located would remain the property of the Tribe as well as the section of land designated for a school and farm. The Act also provided that each tribal member could select a quarter section for an allotment and, under Article IV, in consideration for the cession of land, the United States agreed to pay $485,000.00 to the Tribe. The surplus land was then opened for homesteading on September 22, 1891, by the Presidential Proclamation of September 18, 1891, 27 Stat. 989.

Because of this intervening factor, the situation of the Sac and Fox is incongruous with that of the Navajo's in *McClanahan*. The Allotment Agreement, which disestablished the Sac and Fox Reservation, cannot be interpreted to preclude the extension of state law. It was the Congressional policy at that time to disestablish and individualize all of the reservations in Indian Territory with a view to the ultimate creation of the State of Oklahoma, see *Woodward v. DeGraffenried*, 238 U.S. 284 (1915), for a description of the vast problems experienced with the reservation system in Indian Territory and the efforts of Congress to dispose of the reservations to solve those problems. In this case, the relevant statute, the Allotment Agreement, was intended by the Congress at the time, to assimilate these tribes into the general society which would form a State to make laws for all persons. The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries and force the assimilation of Indians into the society at large, *County of Yakima v. Yakima Indian Nation*, 112 S.C. 683 (1992). In this case, the allotment agreement is the relevant statute and it cannot be construed as a pre-emption of State laws.

However, there are two independent, but related, barriers to the

assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law, and second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The Commission reasoned in the courts below that if the State taxes are to be barred because they infringe the rights of reservation Indians, then the Court must determine the extent of the reservation involved.

In footnote 2 of its Opinion, the Tenth Circuit concludes in light of this Court's ruling in *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, ____ U.S. ____, 111 S.C. 905 (1991), that since trust land in Oklahoma is validly set apart and thus qualifies as a reservation for tribal immunity purposes, it is unnecessary to determine the existence or the extent of the reservation and therefore, the *McClanahan* case applies to exempt tribal members from income taxes despite the physical dissimilarity between the 7.6 million acre Navajo reservation and the Sac and Fox quarter section.

However, the Commission proposes that the reservation boundary has always been a prime consideration in determining the right of the State to tax, or of tribal members to be free from tax. This Court has held in *Bracker* at 448 U.S. 151:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

The distinction between on-reservation activity and off-reservation activity is drawn by the companion cases of *McClanahan* and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In *McClanahan*, the appellant was a tribal member who lived on the Navajo Reservation and earned all of her income within the reservation and was held not to be subject to State income taxes. In *Mescalero*, the Tribe owned and operated a ski resort off of its reservation and was required to pay State gross receipts taxes on its sales. But the situation in this case does not fall neatly within or without the reservation because the Indian Country

herein lies scattered among land over which the State retains jurisdiction.

Although the Sac and Fox member employees work at the tribal headquarters on Indian Country, when they leave for home, they pull their cars out of the tribal parking lot and on to state jurisdiction streets. When they arrive at home, it may or may not be on Indian Country. There is no evidence in this case to show that any tribal employees live on Indian Country. The Tenth Circuit held that the tribal members off reservation activity did not matter. Since they did work on Indian Country, that was enough to satisfy the Appeals Court that *McClanahan* applied to exempt the members from income tax. Besides the bare citation to *McClanahan*, the Tenth Circuit never explained which federal statute pre-empted the State taxes or how tribal self-government on the reservation was infringed when individuals were taxed on their income when they left the reservations. In order to qualify for the *McClanahan* exemption, a tribal member must live and work exclusively on the reservation, which is not the case presented here.

This Court has had occasion to rule on the issue presented here in the case of *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936). In that case a member of the Osage tribe who held a certificate of competency was taxed by the State on his pro rata share of the income of the restricted mineral resources of the Tribe. This Court cited its opinion in *Choteau v. Burnet*, 283 U.S. 691 (1931) for its reasoning that an Osage Indian's income from the tribal mineral resources is subject to federal tax. The Court found that the course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes. The Court reasoned that his share of the tribal mineral resources was payable to him without restriction upon its use and was therefore taxable by the federal government because of his untrammeled ownership of the income.

The Tenth Circuit opinion in the case at bar cannot be reconciled with this Court's authority in *Leahy*. Both cases involve tribal members earning income from tribal sources on Indian Country which is paid to them without restriction. Clearly, the Tenth Circuit opinion is in conflict with this applicable decision. The Tenth Circuit refused to

consider the authority in *Leahy* and granted this exemption only on the status of the taxpayer as an Indian.

Further, this Court distinguished the situation of the Oklahoma Indians from reservation tribes in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). That case dealt with the imposition of estate taxes against the estates of members of the Five Civilized Tribes in Oklahoma. The estates consisted of holdings of trust land or Indian Country, exempt from direct taxation; land holdings not exempt from direct taxation; restricted cash and securities held for the Indians by the Secretary of Interior; miscellaneous personal property and insurance. All assets were taxable by the State except for the trust land exempt from direct taxation. The Court stated at 319 U.S. 602:

> The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. *Worchester v. Georgia*, 6 Pet. 515 (1832), held that a state might not regulate the conduct of persons in Indian territory on the theory that the Indian tribes were separate political entities with all the rights of independent status - a condition which has not existed for many years in the State of Oklahoma.

The Court concluded that the underlying principles on which the reservation decisions are based do not fit the situation of the Oklahoma Indians. Therefore, the estate taxes imposed on the tribal members' estates was valid even though the tribal members lived on Indian Country in Oklahoma. The Court explained at 319 U.S. 604 that the cash and securities of which these estates are almost entirely composed were restricted by the Act of January 27, 1933, 47 Stat. 777. Unless the tax immunity is granted by the restriction clause itself, there is not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities from Oklahoma's estate taxes. The Court concluded that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) applica-

tion of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

These cases from Oklahoma demonstrate that there is no federal pre-emption of the tax laws of Oklahoma because the relevant statutes which disestablished the several reservations in Oklahoma were intended to facilitate statehood and a constitutional state government rather than exclude state government as in the case of the Navajo treaty. Also, the taxation of tribal members in Oklahoma does not infringe upon tribal self-government because there is no reservation boundary which would serve to invest tribal sovereignty with the essential geographical component. This fact was recognized in *Oklahoma Tax Commission* at 319 U.S. 603 where the Court held that, "although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester v. Georgia*." *McClanahan* cited *Oklahoma Tax Commission* as an example of Indians who do not inhabit reservations set aside for their exclusive use and who have become assimilated into the general community such that the sovereignty doctrine has not been rigidly applied to their situation.

The Tenth Circuit opinion avoided discussion of the obviously contrary opinion in *Oklahoma Tax Commission v. United States*, and instead cited *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, ____ U.S. ____, 111 S.C. 905 (1991) for the proposition that trust land in Oklahoma qualifies as a reservation for tribal immunity purposes. Although the citation is accurate, it does not apply to this case. No one is questioning the authenticity of the Indian Country in this case. But *Potawatomi* involved the State's attempt to directly tax a tribe for activity wholly within Indian Country. That is not the case presented by the Sac and Fox. In the case at bar, the State is not taxing a tribe but individual tribal members, off of Indian Country. Of course, the tribal members earn their income on Indian Country, but at the end of the working day, the member employees leave Indian Country. There is not an exclusive reservation upon which tribal members live and earn all of their income. Taxation of tribal members off of the reservation has always been permissible and never infringes tribal self-government. *Mescalero*.

Therefore, the opinion of the Tenth Circuit in this matter conflicts with the opinions of this Court in *Choteau*, *Leahy*, *Oklahoma Tax Commission v. United States*, *McClanahan* and *Mescalero*, among others.

II. THE TENTH CIRCUIT'S OPINION REGARDING STATE MOTOR VEHICLE TAXES IMPOSED ON TRIBAL MEMBERS IS CONTRARY TO OPINIONS OF THIS COURT.

In part two of the Opinion below, the Tenth Circuit held that a state may not require tribal members who properly license their vehicles with the Tribe to pay state motor vehicle taxes, whether in the nature of property or excise taxes. The lower court found these taxes to be prohibited by *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980), because according to the Court of Appeals, both Oklahoma motor vehicle taxes are property taxes. Not only did the Court mischaracterise these taxes, the result of the Courts opinion is to allow the Tribe, by selling tribal license plates, to market an exemption contrary to this courts ruling in *Colville*.

Oklahoma levies two different taxes on motor vehicles. The first tax is the Vehicle Excise Tax found at title 68 O.S. 1991 §2101 et seq. Pursuant to Section 2103 of this Act, an excise tax of 3 1/4% of the value of each vehicle is levied upon the transfer of legal ownership of any vehicle registered in this State. Next, an annual registration fee is imposed under the Oklahoma Vehicle License and Registration Act, title 47 O.S. 1991 §1101 et seq. Pursuant to Section 1132 of this Act, Subsection A sets out the following fees: (1) a registration fee of $15.00 per year for the use of the avenues of public access within this state, and (2) an annual fee in lieu of all other taxes of 1 1/4% of the factory delivered price for the first year and in each subsequent year the fee will be 90% of the previous year's fee.

Section 1103 of the Registration Act states that, it is the intent of the Legislature that the owner or owners of every vehicle in this state shall possess a certificate of title as proof of ownership and that every vehicle shall be registered in the name of the owner or owners thereof. All registration and license fees and mileage taxes imposed by this Act shall be for the purpose of providing funds for the general governmental functions of the state, counties, municipalities and schools and for the maintenance and upkeep of the avenues of public access of this state. Such registration and license fees shall apply to every vehicle operated upon, over, along or across any avenue of public access within this state and when paid in full, shall be in lieu of all other taxes, general and local,

unless otherwise specifically provided.

Although the Tenth Circuit claimed these two taxes were property taxes, the Supreme Court of the State of Oklahoma has held that both the vehicle registration fee and the vehicle excise taxes are excise taxes rather than property taxes in *Application of Baptist General Convention of Oklahoma*, 195 Okl. 258, 156 P.2d 1018 (1945). As to what manner of tax we are dealing with, the law to be applied in this case is the law of the State. The authority and only authority is the State, and if that be so, the voice adopted by the State as its own, whether it be of its Legislature or of its Supreme Court, should utter the last word, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). This Court held in *Moe* and *Colville* that the States in those cases could not impose personal property taxes on vehicles owned by tribal members resident on the reservation and used both on and off the reservation. The Commission submits that this is a different case because the taxes at issue are excise taxes imposed on tribal members who do not live on a reservation and use their vehicles entirely off of Indian Country. The Commission would suggest that the present taxes are therefore valid pursuant to *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

A. Vehicle Excise Taxes.

The Vehicle Excise Tax does not appear to be fully comprehended in the Tenth Circuit opinion which characterizes the tax as a property tax. However, this tax is not paid annually as property taxes are. This tax is paid by the purchaser of the vehicle in order to obtain a certificate of title. The tax is only paid when a vehicle is sold and the new owner applies to the Commission to have the vehicle titled in his or her name. Therefore, if Vehicle No. 1 is sold five times in ten years, each of the successive owners will pay an excise tax in order to transfer the title, for a total of five taxes. But if Vehicle No. 2 is sold only once in that same ten-year period, only one vehicle excise tax will have been required for Vehicle No. 2 compared to five taxes that the owners of Vehicle No. 1 were required to pay.

The Vehicle Excise Tax closely resembles a sales tax. Certainly the Tribe would not propose that when a tribal member patronizes a grocery store off of Indian Country, the tribal member should be exempt from sales taxes on his or her purchases. There is simply no authority for such a position. But in this case, the Tribe is proposing that when

a tribal member shops for a car at an automobile dealership, which are all off of Indian Country, the tribal member's purchase of a vehicle off of Indian Country should be exempt from the Vehicle Excise Tax. This position finds no authority in *Moe* or *Colville*. A tax which is imposed on a tribal member for activity or purchases off of Indian Country is neither pre-empted by federal law nor is it invalid as an infringement of tribal self-government.

The case is much different than *Moe* and *Colville* because those cases involved massive reservation created by treaty. In *Moe*, the Treaty of Hell Gate, 12 Stat. 975 set aside 1.25 million acres for the Flathead reservation in Montana. In *Colville* the Colville Reservation encompasses 1.3 million acres in Washington established by Executive Order on July 2, 1872. The Court found at 447 U.S. 156 that the relevant treaties pertaining to the Colville tribes can be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter. But in the case at bar, the Sac and Fox Treaty was discarded, the reservation disestablished, and the Tribe was not allowed the power to exclude non-Indians or impose any conditions on them because the federal government opened the land to a flood of white settlers who soon organized the territory for Statehood. Therefore, the relevant statute, the Allotment Agreement in this case, contemplated that State law would be applied rather than excluded. As a result, only scattered plots of Indian Country remain in Oklahoma and, for purposes of this argument, the Commission can safely represent that no car dealerships sell cars within Indian Country.

Under the auspices of the Allotment Agreement in this case, in light of its policy and the intended result, it cannot be rationally argued that the Congressional plan intended to pre-empt the state taxing authority in the manner proposed by the Tenth Circuit. There is no immunity for off-reservation activities that have traditionally been recognized in any of the controlling cases. The backdrop of the Indian sovereignty doctrine does not provide any tradition of immunity with regard to this allotment agreement because it was never the intention of Congress to preclude the extension of State law in this area. Therefore, the Tenth Circuit improperly prohibited the Vehicle Excise Tax as applied to tribal members in this case.

B. Vehicle Registration Fees.

The vehicle registration fees under title 47 O.S. 1991 §1101 are similar to the property taxes discussed in *Moe* and *Colville* in that the fee is imposed annually for vehicles used in Oklahoma. However, the Oklahoma Supreme Court has held that the registration fee is an excise tax in *Application of Baptist General Convention of Okla.*, 195 Okl. 258, 156 P.2d 1018 (1945). In that case, the Baptist General Convention contended that it did not have to pay the motor vehicle taxes because the Oklahoma Constitution Art. X, §6 exempted from tax "all property used exclusively for religious and charitable purposes." The Supreme Court ruled that the Baptist General Convention was required to pay motor vehicle taxes because the excise tax and registration fees are both excise taxes and the constitutional exemption only applies to property taxes.

However, the *Colville* opinion indicated at 447 U.S. 163 that the tax will not escape the prohibition merely by calling the tax an excise tax on the use of the vehicle in the State. But the tax in *Colville* was prohibited in the first place only because the tribal members subject to the tax lived on the massive reservation set aside for their use under general federal supervision in which the relevant treaties leave to the exclusive province of the federal government and the tribes. That is not the case presented here.

In this case, the Allotment Agreement does not propose that any State tax law would be pre-empted. If Congress intends to prevent the State of Oklahoma from levying a general nondiscriminatory tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences, *Oklahoma Tax Commission v. United States*. Indian sovereign immunity from nondiscriminatory taxation is a question of congressional pre-emption. In this case, the backdrop of the several allotment agreements does not provide the necessary level of federal supervision and exclusive control that is sufficient to pre-empt these taxes, coupled with the lack of any intent on the part of Congress to do so. This Court has cautioned against invalidating any state taxation absent the clearest mandate, *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). Congress has declined to extend such a mandate to the Indians in this case. Given the attitude of Congress in the Allotment Agreement, Congress never intended to prevent Oklahoma from levying these taxes, which is the primary consideration in the pre-emption inquiry.

Another aspect of this case is the balancing approach used in the

Colville decision to evaluate these types of taxes. At 447 U.S. 156-157 this Court stated:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

In the case at bar, the State has the strongest interest in imposing its annual registration fee as opposed to the Tribe because the State has the sole obligation of building and maintaining roads in Oklahoma as well as providing related government services to the motoring public. The tribal member taxpayers in this case are the direct beneficiaries of these roads and services which are not provided by the Tribe. Also, the registration fees are directed at off-reservation value.

In Oklahoma, neither the Sac and Fox, nor any of the other forty different tribes located here, build or maintain streets roads or highways since the Indian Country is broken up into small scattered tracts and the State provides all the necessary roads in the first place. The Sac and Fox have built driveways or parking lots on their land, but this is nothing that any other private landowner would not do. However, the total mileage of driveways built by the Sac and Fox is de minimum compared to the over 111,000 miles of roads provided by the State and local governments. However, the Tribe argues that tribal employees park their cars on Indian Country for a much greater part of the workday than the drive time in which those cars are on State jurisdiction roads. The State submits that this may be true but irrelevant because the value of an automobile is principally realized by using it to travel across the roadways rather than parking it in a parking lot. The registration fees are therefore aimed at off-reservation value since the use of a vehicle in Oklahoma is necessarily off-reservation only.

The State vehicle registration system also provides safety and security to the motoring public. The State registration provides information on the ownership of vehicles that can be accessed by police when

vehicles are involved in criminal activity. Also, the State requires vehicle registrants to carry automobile insurance to provide financial responsibility for damage that the operator of a vehicle may cause. The State title laws protect the ownership interest in vehicles as well as the security interest of financial institutions who lend on the vehicle as collateral by providing a statewide filing system to record this information with the Tax Commission and other State law enforcement agencies that safeguard the vehicle from theft, title counterfeiting, title laundering, or tampering with odometer readings. If the Tax Commission is compelled to accept at face value a title from any one of forty different tribal governments in this state, the functions of the State registration system would be compromised. If motor vehicle titles could be easily obtained at low cost from a variety of tribal governments which have less experience and sophistication in maintaining proper controls over a registration system, along with the fact that tribal records are inaccessible to state agencies, then that situation would result in unacceptable losses to auto dealers, banks, insurance companies and automobile owners and buyers as well as hindering law enforcement.

On the other side of the scale, the only thing the Tribe offers for its registration is the opportunity for the registrant to pay tribal taxes. The Tribe will provide no roads or any of the attendant governmental services that the State provides to vehicle owners. Under the balancing approach, the Tribe offers little of anything in return for its taxes while the State provides the totality of transportation and governmental services to these taxpayers. This is a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Since the federal legislation disestablishing the reservations in Oklahoma has left the Tribe with no duties or responsibilities respecting road building and related services, it cannot be contended that Congress intended to leave to the Tribe the privilege of levying this tax to the exclusion of similar State taxes. The State does not contend that the Tribe should be prohibited from levying this or any tax, but the State does contend that the tribal tax levy does not oust the imposition of State taxes on tribal members' activities off of Indian Country. The Tenth Circuit never considered these factors in its opinion and invalidated the state taxes without a thorough review of state law and precedents necessary to determine whether the scheme in fact contravenes federal law.

CONCLUSION

Because the Tenth Circuit Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court, review by this Court is urgently required. For these reasons, a writ of certiorari should issue to review the Order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAC AND FOX NATION, Appellee/Cross-Appellant,	)	
v.	)	Nos. 91-6236 and 91-6237
OKLAHOMA TAX COMMISSION, Appellant/Cross-Appellee.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-90-1553-A)

G. William Rice (N. Brent Parmer and Gregory H. Bigler with him on the briefs) of G. William Rice, P.C., Cushing, Oklahoma, for Plaintiff-Appellee and Cross-Appellant.

David Allen Miley, Assistant General Counsel (David Hudson, General Counsel, with him on the briefs), Oklahoma Tax Commission, Oklahoma City, Oklahoma, for Defendant-Appellant and Cross-Appellee.

Before MOORE and BRORBY, Circuit Judges, and HUNTER,* District Judge.

BRORBY, Circuit Judge.

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* The Honorable Elmo B. Hunter, Senior District Judge for the District of Missouri, sitting by designation.

We are called upon here to resolve two issues arising from a conflict between the asserted taxing power of the State of Oklahoma and the tax immunity claimed by the Sac and Fox Nation, a federally recognized Indian tribe: (1) whether the Oklahoma Tax Commission has legal authority to tax income derived from the Sac and Fox; and (2) whether the Oklahoma Tax Commission has legal authority to impose an excise tax and licensing fee on motor vehicles properly tagged by the Sac and Fox. We conclude the district court succinctly characterized the relevant issues and correctly applied existing precedent. We therefore affirm.

I. Background

Both parties appeal the district court's ruling on cross motions for summary judgment.[1] Notably, neither party argues that summary judgment was procedurally incorrect due to the existence of a genuine issue of material fact. Instead, they challenge the legal determinations made by the district court after applying relevant authority to the stipulated facts. We review those determinations de novo. *Brown v. Palmer*, 944 F.2d 732, 733-34 n.1 (10th Cir. 1991) (citing *Gonzales v. Millers Casualty Ins. Co.*, 923 F.2d 1417, 1419 (10th Cir. 1991).

Factually, the record reveals this dispute arises primarily on land held in trust by the United States Government for the benefit of the Sac and Fox (also referred to as "the Tribe"). These lands consist of Tribal headquarters which are located in central Oklahoma on a quarter section (160 acres) excepted from operation of the Sac and Fox Allotment Agreement Act of February 13, 1891; one section (640 acres) reserved from the Allotment Agreement for the Sac and Fox School; and remaining individual trust allots owned by the Sac and Fox.

The Sac and Fox brought this suit in response to Oklahoma's

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[1] The district court held: (1) the State may properly levy and collect income tax on income derived from tribal employment on trust lands and received by non-tribal members; however, the State may not sue the Tribe for damages to collect the tax; (2) the State may not levy or collect income tax on income derived from tribal employment on trust lands and received by tribal members; (3) the State may not, as a prerequisite to issuing an Oklahoma motor vehicle title, require payment of an excise tax and license tag fee for those years a vehicle was tagged properly by the Tribe. The State appeals that part of the judgment restricting state tax authority over tribal members, while the Tribe cross appeals that part of the judgment granting the State tax authority over nonmembers.

assertion of tax authority over income derived from the Tribe and over motor vehicles properly tagged by the Tribe. The Complaint prayed for an injunction preventing the Oklahoma Tax Commission from enforcing state tax laws against persons residing or employed within Sac and Fox territorial jurisdiction. The Tribe asserted sovereign immunity as the basis for its claim.

The Sac and Fox Tribe employs both tribal members and nonmembers. The earnings of all tribal employees are subject to a tribal income tax. While the Oklahoma Tax Commission does not challenge the Tribe's right to levy its own tax, the Commission claims all tribal employees must also pay state income taxes. The Commission enforces state income taxes against tribal members and nonmembers by issuing tax assessments against individuals failing to pay the state tax.

The Tribe also taxes the ownership of motor vehicles principally garaged on land within its jurisdiction. Upon payment of the tribal tax, each motor vehicle owner receives a Sac and Fox license plate, certificate of title and registration certificate. Here again, the Oklahoma Tax Commission does not contest the Tribe's tax authority. However, the State requires "retroactive" payment of money equivalent to the taxes, penalties, and interest it would have imposed upon motor vehicles during the time they were taxable by the Tribe as a prerequisite to issuance of an Oklahoma title and registration when such vehicles are sold, traded, or otherwise removed from tribal jurisdiction.

Against this factual background, we begin our legal analysis from the premise first enunciated in *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973), that direct state taxation of tribal property or the income of a tribal member earned solely on a reservation is presumed to be preempted, absent express congressional authorization. See also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215-16 & n.17 (1987); *Bryan v. Itasca County*, 426 U.S. 373, 375-77 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 475-76 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Conversely, a state may nondiscriminatorily tax nonmember activities on a reservation so long as such taxation does not conflict with relevant statutes or treaties or impermissibly interfere with a tribe's ability to govern itself. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Cabazon*, 480 U.S. at 215-16; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 151-61 (1980). Moreover, we acknowledge that trust land, validly set

apart for Indian use under government supervision, "qualifies as a reservation for tribal immunity purposes." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, ____ U.S. ____, ____, 111 S.Ct. 905, 907 (1991).[2]

II. Income Tax

A. Taxation of Tribal Members

In *McClanahan*, the Supreme Court held the State of Arizona could not levy or collect an income tax on wages earned by a Navajo tribal member from her work on the Navajo reservation. 411 U.S. at 173. Applying a federal preemption analysis against the backdrop of the Indian sovereignty doctrine, the Court reasoned that "by imposing the [income] tax ... the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves."[3] Id. at 165.

It would serve little purpose to retrace the *McClanahan* analysis here. The Sac and Fox is a federally recognized Indian tribe operating under a tribal constitution and federal corporate charter.[4] The treaties,

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[2] On Appeal, the State asserts as error the district court's failure to determine the status of the Sac and Fox Reservation. In light of the Supreme Court's ruling in *Potawatomi*, we fail to see the relevancy of this issue. It appears as though the State of Oklahoma persists in fighting a battle it has already lost.

The focus in this type case is tribal immunity from state jurisdiction. The Supreme Court has made it clear that established principles of tribal immunity extend to trust lands as well as reservations. *Potawatomi*, 111 S. Ct. at 907. Oklahoma's attempt to circumvent this rule by shifting the focus and by emphasizing the physical dissimilarity between the large Indian reservations involved in prior cases and the randomly scattered trust lands of the Sac and Fox amounts to an exercise in futility. The State cites no authority for its proposition that the size and physical distribution of Indian country should control the degree of tribal immunity asserted on those lands. The State does not challenge the presence of Sac and Fox trust land, nor does it assert the Sac and Fox Tribe is exercising jurisdiction outside that land. We therefore agree with the district court that the status of the Sac and Fox Reservation is not a material issue in this case.

[3] We reject the State's contention that the tax immunity recognized in *McClanahan* is limited to only those Indians residing on the reservation, or in this case on the tribal trust lands. The State's narrow reading of *McClanahan* violates the essence of the decision which afforded immunity from state taxation for Indian income derived from employment on tribal lands. See *Moe*, 425 U.S. at 475-476; *Mescalero*, 411 U.S. at 148.

[4] The Sac and Fox Tribe, like the Navajo in *McClanahan* and the Salish and Kootenai in *Moe*, plainly has not abandoned its tribal organization.

statutes and correspondence cited by both parties indicate Congress consistently has recognized the integrity of the Sac and Fox Tribe and its right to self-govern within relevant jurisdictional boundaries. Nothing in the record conflicts with the acknowledged contemporary congressional goal of Indian self-government, including tribal self-sufficiency and economic development. See *Cabazon*, 480 U.S. at 216. This case is therefore indistinguishable from *McClanahan* in that tribal compensation of Sac and Fox member-employees falls totally within the sphere of activity reserved to the federal government and to the Sac and Fox Tribe itself. See 411 U.S. at 179-80.

The State asserts no congressional authority for imposing the state taxes at issue. Therefore, applying the *McClanahan* presumption, we conclude Oklahoma has exceeded its authority -- the state income tax is unlawful as applied to Sac and Fox members whose income is derived solely from tribal sources on tribal lands.

B. Taxation of Nonmembers

When evaluating Oklahoma's authority to tax the income of nonmember tribal employees, precedent weighs in the State's favor. Although the Supreme Court has never explicitly addressed state taxation of nonmember income derived from tribal sources, the Court has, in general, considered favorably nondiscriminatory state taxation of nonmember activities on a reservation so long as such taxation does not conflict with relevant statutes or treaties or impermissibly interfere with a tribe's ability to govern itself. *Colville*, 447 U.S. at 151-61; *Moe*, 425 U.S. at 481-83. See also *Cotton Petroleum*, 490 U.S. at 175; *Cabazon*, 480 U.S. at 215-16. In other words, state taxation of nonmember activity on a reservation is legitimate if the burden imposed on the tribe is minimal -- if the tax does not frustrate tribal self-government or run afoul of congressional enactments concerning the affairs of reservation Indians. *Moe*, 425 U.S. 483 (citations omitted).

The Tribe relies primarily on the Indian Commerce Clause and treaty language granting the Sac and Fox jurisdiction over all who "settle upon their lands" as support for its broad assertion of exclusive tax authority. Additionally, the Tribe asserts that decisions on state taxation of gaming within Indian country should control the determination of whether non-tribal members are subject to state income taxes.

The Tribe's argument is unavailing for several reasons. First,

"[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes." *Colville*, 447 U.S. at 157. Second, the Tribe cites no authority showing the Supreme Court, this court, or any other court has interpreted the jurisdictional language of any Indian treaty so as to grant a tribe exclusive jurisdiction over non-tribal members. Third, we conclude the gaming decisions are entirely distinguishable from the present case. The payment of wages to nonmember employees is not comparable to the operation of bingo games designed to attract nonmembers onto Indian land in order to generate revenue. Finally, and most importantly, notwithstanding its bald assertion to the contrary, the Tribe has failed to show how the imposition of a state income tax on nonmember tribal employees frustrates tribal self-government. The Tribe argues that all tribal employees benefit from government services and regulations which protect workers, including an extensive tribal code, police, courts, etc.; however, the Tribe fails to demonstrate how state taxation of nonmember employees would interfere with providing these services or any other aspect of tribal government. We therefore conclude the Oklahoma Tax Commission may lawfully tax the income of those tribal employees who are not members of the Sac and Fox Tribe.[5]

III. Motor Vehicle Tax

Tribal taxation and registration of motor vehicles applies "to all motor vehicles owned by a resident of, and principally garaged within the jurisdiction of the Sac and Fox Tribe." Sac and Fox General Revenue and Taxation Act, Title 14, Chapter 8, Section 802. Thus, the Tribe may tag motor vehicles owned by both members and nonmembers.[6]

The State of Oklahoma imposes two motor vehicle taxes. The

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[5] Note, however, the State may not sue the Tribe to recover previously uncollected taxes. *Potawatomi*, _____ U.S. at _____, 111 S. Ct. at 911.

[6] The district court apparently was mistaken regarding the scope of tribal motor vehicle licensing. Operating under the assumption that only tribal members could obtain tribal tags, the district court limited its ruling to the State's authority (or lack thereof) to tax tribal members owning automobiles properly tagged by the Sac and Fox Tribe. While we conclude this ruling is correct, we go further to address the State's authority to tax non-tribal members owning automobiles properly tagged by the Tribe.

first is the Vehicle Excise Tax calculated at three and one-half per cent of value and imposed upon transfer of legal ownership. The second tax is the annual registration fee imposed on every vehicle operated upon, over, along, or across any avenue of public access within Oklahoma. This tax is imposed in lieu of a personal property tax on automobiles. The Oklahoma Tax Commission enforces these taxes by requiring the purchaser of a vehicle previously tagged by the Tribe to pay back motor vehicle taxes for the time during which the vehicle was tribally tagged as a prerequisite to issuance of an Oklahoma title and license plate.

A. Taxation of Tribal Members

Moe and *Colville* are dispositive on this issue: a state may not require a tribal member residing on tribal lands to pay state motor vehicle taxes, whether in the nature of property or excise taxes. *Colville*, 447 U.S. at 162-64; *Moe*, 425 U.S. at 469, 480-81. Although characterized by the State as a sales tax and a use tax in an attempt to circumvent established precedent, the first state motor vehicle tax is not enforced as a sales tax against Sac and Fox purchasers, and the State has offered no evidence to show the second tax is tailored to the amount of use outside Indian country. Under the circumstances, both Oklahoma motor vehicle taxes are best characterized as property taxes and therefore are flatly prohibited under *Moe* and *Colville*.

Although the State does not impose such motor vehicle taxes on tribal members directly, requiring nonmember purchasers to pay back taxes on tribally tagged vehicles burdens tribal members by diminishing the fair market value of their automobiles upon sale. We will not permit the State to tax indirectly what it cannot tax directly. We therefore hold the State may not tax motor vehicles for periods when such vehicles were licensed properly to tribal members by the Tribe.

B. Taxation of Nonmembers

The Tribe again relies on the Indian Commerce Clause and treaty language as support for its assertion of exclusive tax authority over motor vehicles principally garaged on tribal lands. The Tribe also continues to assert that Indian gaming decisions should control this issue.

Again, we reject these arguments. As previously discussed, the

Indian Commerce Clause provides no independent protection from state taxation, and the Tribe cites no authority in support of its broad interpretation of treaty language. The gaming decisions are even more distinguishable in this context as the Tribe's sale of motor vehicle tags to non-tribal members more closely resembles the marketing of a tax exemption clearly disfavored in *Colville*. See 447 U.S. at 154-55, 160-61.

The Tribe emphasizes that the motor vehicles subject to tribal taxation are garaged within Indian country and are often parked for extended periods within Indian country while the nonmember owners work. The Tribe also asserts that nonmember motor vehicle owners receive government services from the Sac and Fox. Nevertheless, the relevant issue is tribal immunity. The Tribe cannot argue seriously that motor vehicles owned by non-tribal members constitute tribal property. Furthermore, the fact that non-tribal members may live and garage their motor vehicles on tribal land does not accord those individuals tribal status. Here again, the Tribe has failed to show how the imposition of state taxes on nonmembers' motor vehicles frustrates tribal self-government. We therefore hold the State may lawfully tax motor vehicles owned by non-tribal members.

IV. Conclusion

Evaluating the record presented on appeal in light of controlling Supreme Court precedent, we readily conclude the Oklahoma Tax Commission may not lawfully tax the income of tribal members who are employed by and receive wages from the Sac and Fox Tribe. The Commission is also without authority to collect taxes on motor vehicles for periods when such vehicles were licensed properly to tribal members by the Tribe. Conversely, the Commission may tax the income of non-tribal members employed by the Sac and Fox as well as those tribally-tagged motor vehicles owned by non-tribal members. The district court's ruling on cross motions for summary judgment is therefore AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION, Plaintiff,	)	
v.	)	NO. CIV-90-1553-A
THE OKLAHOMA TAX COMMISSION, Defendant.	)	

ORDER

Before the Court for determination are cross-motions for summary judgment. Each party has responded to the motion of the other, and after review of all briefs and the relevant law, the Court grants in part and denies in part each motion for the following reasons.

BACKGROUND

The relevant facts and many of the basic authorities are not at issue, and the parties only disagree as to the legal conclusions to be drawn. Plaintiff ("the Tribe") raises two issues: first, the defendant's ("the Commission") legal right to tax income derived from the Tribe by both Indians and non-Indians, and second, the Commission's legal right to require that, to obtain an Oklahoma motor vehicle title, non-Indian purchasers of Indian-owned vehicles must pay excise tax and license tags for the "back" years in which the vehicle was properly tagged by the Tribe.

Income Tax

It is agreed by the parties that this case arises on land near Stroud, Oklahoma, held in trust by the United States Government for

the benefit of the Tribe. The Tribe's headquarters are located on trust land, and the Tribe pays its officers and employees for services rendered to the Tribe primarily on the trust land. The Tribe also employs non-members and compensates them for their services. The Tribe levies its own tax on the earnings of its employees,[1] but argues that the Commission may not levy a state tax on income derived from the Tribe. The Commission does not contest the Tribe's right to levy its own tax, but claims that the Tribe must also collect state income tax on the earnings paid to its employees. The Tribe argues that the doctrine of tribal sovereign immunity prevents the Commission from imposing or collecting any state income tax on wages it pays to any employee.

Vehicle Tax

The Commission does not directly challenge the right of the Tribe to tag vehicles owned by tribal members and primarily garaged on trust lands. However, to obtain an Oklahoma title under the current system as administered by the Commission, the purchaser (or the seller) of a vehicle previously tagged by the Tribe must pay the tags and excise tax for the years in which the vehicle did not have Oklahoma registration and for which the statutes otherwise require payment. Okla. Stat. Ann. tit. 68, §2101 *et seq.*; Okla. Stat. Ann. tit. 47, §1101 *et seq.* The effect of this practice is to make the sale of Indian-owned vehicles commercially unfeasible; the Tribe also claims that this practice interferes with its right to self-government.

The Commission responds that, as to both issues of income tax and vehicle tax, the State of Oklahoma may tax members of the Tribe (as well as non-members) because the trust lands are not reservations. Earlier case law that has dealt with issues of income and motor vehicle tax has arisen in the context of reservations, and thus the Commission argues that a different result follows here. This Court disagrees.

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[1] The Tribe has argued that the imposition of both its own tax and a state income tax results in some tribal members not paying the tribal tax. The Commission has not contested the Tribe's right to tax its own members, and that issue is not before the Court now. Any difficulty encountered by the Tribe on collecting the tribal tax is a matter between the Tribe and the tribal member, and is not germane to the issue of whether the Tribe may be required to collect state tax on income paid to its non-tribal employees.

DISCUSSION AND AUTHORITY

The parties have spent a large portion of their briefing efforts discussing the distinction (or lack thereof) between Indian Country and reservation. This is a distinction without a difference, though, in light of the Supreme Court's recent decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). The Commission made the same argument there as here, namely, that the Potawatomi Tribe should be required to collect state sales tax on cigarettes sold at tribal smokeshops to both tribal and non-tribal members because the smokeshops were located not on a reservation but on trust lands. The Supreme Court found that the important inquiry was "whether the area has been `validly set apart for the use of the Indians as such, under the superintendence of the Government,'" and that trust land therefore "qualifies as a reservation for tribal immunity purposes." *Citizen Band Potawatomi Tribe*, 111 S.Ct. at 910.[2]

This conclusion makes directly applicable all the prior cases that have dealt with these very same issues, but that were decided in the context of reservations. A brief review is in order.

In *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), the Court held that the State of Arizona could not levy or collect an income tax on wages earned by a Navajo tribal member from her work on the Navajo reservation. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) held that sales of cigarettes by Indians to Indians on the reservation could not be taxed by the state, but that sales on the reservation by Indians to non-Indians could be taxed by the state. The tax of sales to non-Indians was "a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. ... [N]othing in this burden...frustrates tribal self-government or runs afoul of any congressional enactment dealing with the affairs of reservation Indians." *Moe*, 96 S.Ct. at 1646 (citations omitted). The prohibition of tax of personal

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[2] Based on the Supreme Court's conclusion that trust land qualifies as a reservation for purposes the tribal immunity, this Court uses the terms interchangeably in this Order. Where the words "trust lands" appear, the word "reservation" is equally aplicable, and vice versa.

property located on the reservation also extended to motor vehicles owned by tribal members. *Moe*, 96 S.Ct. at 1644-45.

The tax of motor vehicles was considered again in greater depth in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). While the tax in *Moe* was placed on personal property, the tax at issue in *Colville* was an excise tax imposed for the privilege of using a motor vehicle in the State of Washington. The Court refused to allow Washington to circumvent *Moe* because the state had not tailored its tax to the amount of off-reservation use of a vehicle. In dicta, the Court indicated that Washington was free to levy a tax on use of a motor vehicle outside the reservation, but that its failure to do so required the Court to treat the case as a repeat of *Moe*.

The facts before the Court now do not vary in any significant way from those in the cases above. First, the Commission may not tax the income of Sac and Fox tribal members that is derived from tribal employment on trust land. The Supreme Court has examined and rejected the Commission's argument that the trust lands should be treated differently from the reservation land, and this Court will not disregard the Supreme Court's clear statement that lands held in trust are the same as a reservation for tribal immunity purposes.

However, the Commission may tax the income of non-tribal members derived from tribal employment on trust lands. This is entirely consistent with the minimal burdens imposed by collection of tax on cigarette sales in *Moe* and reaffirmed only two months ago in *Citizen Band Potawatomi Tribe*. Even though the Commission is prevented from suing the Tribe for damages to collect the tax, the Commission has available to it other methods of collecting revenue lawfully due to it. See, *Citizen Band Potawatomi Tribe*, 111 S.Ct. at 912.[3]

Second, the Commission's practice of requiring payment of tags and excise taxes that it considers delinquent for the years a vehicle was tagged by the Tribe attempts to do indirectly what the Commission cannot do directly. The Commission cannot under *Moe* and *Colville*

[3] The Tribe's immunity does not in any way affect the liability of a non-tribal member for payment of state income tax, or the Commission's ability to collect that tax from the taxpayer. The Court only holds today that the Tribe cannot be sued for collection of tax on non-tribal members, and that the Commission cannot tax tribal members themselves who derive all their income from the Tribe's business conducted on trust lands.

require a tribal member living on trust land to pay state motor vehicle taxes, whether in the nature of property or excise taxes. The attempt to "retroactively" collect these taxes frustrates the proper exercise of tribal governmental, and is an impermissible attempt to interfere in the Tribe's legitimate functioning."[4]

CONCLUSION

The Commission's motion for summary judgment is granted insofar as it seeks to levy and collect income tax on income received by non-tribal members that is derived from tribal employment on trust lands. However, the Commission may not sue the Tribe for damages to collect the tax. The Commission's motion is denied insofar as it seeks to impose a state income tax on income received by tribal members on income derived from tribal employment on trust lands. The Commission's motion is also denied insofar as it seeks, as a prerequisite to issuing an Oklahoma motor vehicle title, to require payment of license tags and excise tax for prior years that a vehicle was properly tagged by the Tribe.

The Tribe's cross-motion is granted to the extent that the Commission's motion is denied, and is denied to the extent that the Commission's motion is granted.

It is so ORDERED this 17th day of April, 1991.

S/Wayne E. Alley

WAYNE E. ALLEY
United States District Judge

[4] This ruling does not affect or reach an issue not raised by either party: whether the Commission can require tribally tagged vehicles to be tagged by the State if and when the vehicle leaves trust land or the reservation as that term is used by the Supreme Court.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION, Plaintiff,	)	
v.	)	NO. CIV-90-1553-A
THE OKLAHOMA TAX COMMISSION, Defendant.	)	

ORDER

On April 17, 1991, this Court issued its Order disposing of cross-motions for summary judgment. Both parties have now moved for the Court to reconsider its Order, each apparently unhappy with the Court's ruling. After review of the briefs of counsel, and further review of the relevant law, the Court denies both motions to reconsider and adheres to its prior Order.

The Court believes it adequately stated its ruling and the reasoning upon which the ruling was based, but in an abundance of caution, it will restate its ruling and attempt to explain again how it reached the conclusion it did. The Court generally looks with great disfavor on motions to reconsider, but will give these parties the benefit of the doubt due to the complicated nature of the law at issue.

DEFENDANT'S MOTION TO RECONSIDER

Defendant's motion to reconsider complained that: first, the Court did not resolve whether the Sac and Fox reservation has been disestablished; second, the Court's ruling that Oklahoma may not impose income tax on tribal members' income from the tribe is in conflict with controlling Supreme Court cases; and third, the Court's injunction of the State's enforcement of motor vehicle taxes is overly broad and not supported by Supreme Court precedent.

1. Disestablishment of the Reservation

Defendant advanced this argument in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, ____U.S. ____, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), and lost when the Supreme Court declined to draw the urged distinction between a reservation and trust land. Regardless whether defendant likes the result, the Supreme Court's conclusion could not be clearer that there is no distinction for tribal immunity purposes between a reservation and trust land that has been validly set apart for the use of the Indians.[1] 111 S.Ct. at 910.

The fact that trust land in Oklahoma is scattered randomly among hundreds of tracts of varying sizes does not change the Supreme Court's holding that trust land is the same as a reservation for tribal immunity purposes. The Court agrees with plaintiff's statement that "the question of whether the Sac and Fox reservation exists is technically irrelevant to the decision in this case." The Court would only change the word "technically"; the issue is flatly irrelevant given the Supreme Court's holding in *Citizen Band Potawatomi*. This Court is not required to determine issues not raised by the pleadings, and the existence of the reservation is likewise not a dispositive issue here. The many cases dealing with reservations are now applicable given the Supreme Court's ruling that trust land is to be treated as a reservation for tribal immunity purposes. Thus, the issue of existence of the reservation is simply not necessary to the resolution of this case. Defendant has tried this approach before and lost in the highest federal court in the land, and this Court will not enter a ruling directly contrary to a controlling case handed down only three months ago.

2. Income Taxation of Tribal Members

Defendant argues that *McClanahan v. State Tax Commission of*

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[1] Defendant states that this Court concluded that trust land is a reservation, but misconstrues the Court's conclusion. The Court only concluded that for tribal immunity purposes there is no difference between a reservation and trust land. This is not the ame as holding that trust land is a reservation. Whether trust land and a reservation are identical is not necessary to determination of this case, and the Court expressly does not reach that issue. Again, the Court's conclusion is only that for tribal immunity purposes, there is no difference between a reservation and trust land.

Arizona, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) sets out a three-part test that must be met before a tribal member's income from the tribe may be exempt from state tax. Nowhere does the opinion set out such a test, and apparently defendant believes this test to be required from the facts of the case. It is true that the Indian involved in *McClanahan* lived on a reservation, but this Court does not read the case to mean that a tribal member who is employed by the tribe but living on non-Indian land (neither reservation nor trust land) is automatically subject to state income tax.

Instead, the focus of inquiry is tribal immunity. The Court in *McClanahan* did not have before it these exact facts, but this Court believes that the message remains the same: the tribe and its tribal employees enjoy immunity from suit for state income taxes. Defendant has neither argued nor demonstrated that it has acquired jurisdiction over the people or land of the Sac and Fox as provided by 25 U.S.C. §1322. Therefore, defendant's attempt to tax income derived from tribal employment by tribal members is inconsistent with tribal self-determination and tribal immunity.

3. Motor Vehicle Taxes

Defendant argues that the Court too broadly stated that the State may not require payment of registration and excise taxes on any automobile "properly tagged" by a tribe, because this language could include non-Indians who obtain tribal tags. The Court thought its language was clear, but for the benefit of defendant will restate its position. Only tribal members may obtain tribal tags and still have an automobile that is properly tagged. Defendant's construction of the Order to imply that the Court authorized avoidance by non-tribal members of Oklahoma motor vehicle taxes takes the language of the Order entirely out of context. There is no authority urged by plaintiff or known by this Court that provides a basis for a non-tribal member to tag an automobile with a tribal tag and thereby avoid Oklahoma motor vehicle taxes. This portion of the Order applies only to tribal members who own automobiles that are primarily garaged on trust land and tagged by the tribe of which they are members. This ruling does not depend on the extent of the Sac and Fox reservation, much as defendant would like the Court to decide otherwise. The ruling depends instead on tribal immunity, and is directly supported by *Washington v. Confederated Tribes of the Colville Indian Reservation*,

447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980).

To recap *Colville*, the Supreme Court held that the State of Washington could not circumvent the holdings of prior cases by denominating the vehicle tax as a "use" tax, rather than by calling it a "property" tax that had previously been held invalid. Washington had not attempted to prorate the use tax as to the extent of use of vehicles on and off the reservation, and thus the Court held that the state's attempt to tax without proration was prohibited. "Had *Washington* tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had." 100 S.Ct. at 2086.

This situation of prorated tax based on use of the motor vehicle on and off the trust land is what the Court implicated in footnote 4 on page 6 of the Order, and what the Court believes neither party raised or addressed. Defendant stated in its Motion to Reconsider that "[t]hat issue is what this case is about and was raised and briefed by the State in the Commission's [brief]." Defendant has apparently misunderstood the Court's footnote, because Defendant has not addressed, and the issue is not today before the Court, what the State may lawfully do toward prorating motor vehicle taxes under these narrow circumstances. Both parties briefed the issues in a "winner take all" posture, and did not consider or propose a legal position that could encompass prorated tax. The Court has gone to this length to explain its position in order to make clear to defendant that the Court has indeed decided the issues before it, and that it will not decide issues not before it.

In conclusion, defendant's Motion to Reconsider is based in large part, if not entirely, on the assumption that the Court must decide the "reservation" issue. Existence of the reservation is not material to determination of this case, and the Court's ruling stands.

PLAINTIFF'S MOTION TO RECONSIDER

Plaintiff urges the Court to alter or amend its judgment, arguing that the Court should have applied the bingo cases rather than the cigarette ones. Plaintiff asserts that it is not marketing an exemption as tribes do that sell cigarettes without a state tax, and that therefore the Supreme Court's holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) should apply. In *Cabazon*, the Supreme Court held that the State of California could not

regulate tribally operated bingo games held on the reservation, because the regulation would "impermissibly infringe on tribal government." 107 S.Ct. at 1095. The Supreme Court distinguished bingo operations from cigarette sales where an exemption from state tax is sold by pointing to the generation of value on the reservation through activities in which [the tribes] have a substantial interest. See, 107 S.Ct. at 1094.

The sale of license tags is not akin to a bingo operation, and neither is employment of non-tribal members. The Cabazon tribe's operation of the bingo games was designed to attract non-tribal members onto the reservation in order to do business. In the case now before the Court, the non-tribal members are not lured to the tribal headquarters as potential customers of the tribe, but as employees. In other words, the Sac and Fox pay money to the non-tribal members, and not the other way around as in the context of a bingo game. Likewise, the sale of license tags by the tribe is limited to tribal members, and there is no possibility that the tribe could use license tags for a revenue raiser as the Cabazon tribe used bingo to raise revenue.

The Court rejects the bingo cases as controlling or even persuasive on the issues presented by this lawsuit, and adheres to its ruling that the state may enforce its laws as to motor vehicle taxes[2] and income taxes against non-tribal members. The fact that a non-tribal member may live on and garage an automobile on trust land does not thereby avail the non-tribal member of tribal status. The non-tribal member is subject to state motor vehicle tax laws regardless of his or her residence. The issue here is tribal sovereignty, and a non-tribal member by definition does not enjoy the benefits of tribal sovereignty.

Finally, plaintiff argues that treaties with the United States grant the Sac and Fox exclusive jurisdiction with all who "settle upon their lands," thus leaving no room for the state to tax non-tribal members who either work for the tribe or who live on trust land. For the reasons stated above with regard to tribal sovereignty, the Court rejects this argument as well. Further, the Court notes that no case law has been cited in support of this proposition.

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[2] The Court does not by this statement alter its prior Order where it held that defendant may not require payment of "back" license tags and excise tax in order to obtain an Oklahoma motor vehicle title. That portion of the prior Order (as well as the rest of the Order) remains intact. The Court today only addresses, and rejects, the new argument raised by plaintiff that a non-tribal member who lives on and garages an automobile on trust land is exempt from paying state motor vehicle taxes.

CONCLUSION

After extensive review of the briefs and responses of both parties to both Motions to Reconsider, the Court denies both motions for all the above-stated reasons.

It is so ORDERED this 21st day of May, 1991.

S/Wayne E. Alley

WAYNE E. ALLEY
United States District Judge

No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Sac and Fox Nation, respectfully prays that this Honorable Court deny the Petitioner's request for a writ of certiorari. The Respondent believes that the decision of the Tenth Circuit regarding state taxation of tribal members was in line with all previous decisions of this Court and does not raise any new or unresolved areas of Federal Law. As this Court has stated: "We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 fn. 17 (1987).

OPINIONS BELOW

See Petitioner's Appendix A-1 to A-19.

JURISDICTION

Respondent accepts Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Respondent believes that Petitioner's Nature of the Controversy mischaracterizes some aspects of the lower court proceedings. Respondent refers the Court to the

"Background" statement of the Court of Appeals for the Tenth Circuit contained in Petitioner's Appendix at A-2 to A-3.

The first item of disagreement is that the Respondent asserts the Petitioner was attempting to tax the value of vehicles garaged upon tribal land, and was not taxing the vehicles at issue for their use of state roads. The Petitioner also consistently refers to the "former" Sac and Fox reservation despite Petitioner's own admission that the lower courts expressly refused to rule on whether or not the Tribe's reservation was extinguished. Petitioner's Brief, p.4; *see also* Petitioner's Appendix A-4, footnote 2, and Appendix A-15. The references to "former" are an attempt to create a distinction among the various types of Indian Country for the purposes of shifting jurisdiction. Such distinction would directly contradict the holding in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, ___ U.S. ___, 111 S.Ct. 905 (1991). Petitioner furthers its effort to create distinctions among classes of Indian Country by the misstatement that the Tribal lands are not contiguous but are randomly scattered throughout state jurisdiction. While many of the lands are distributed among state lands, many are clustered together and adjoin each other. However, even this fact is not particularly relevant given the Court's prior holding in *Potawatomi*.

The State also claims that everyone who performs work in Indian Country is subject to state taxation. Respondent and the lower courts disagreed. Respondent believes that the decisions of this Court also lend no support to Petitioner's position. The Petitioner's brief claims that "the State imposes an annual registration fee

on the owners of every vehicle operated upon, over, along or across any avenue of public access in [Oklahoma]" Brief at p.3. This statement is simply not true, as the state does not tax, nor assess a fee for personal, as opposed to commercial, vehicles registered out of its jurisdiction and used upon its highways, such as cars from other states, countries or federal vehicles.

Respondent would also note that the decision of the District Court was not based only upon briefs submitted by the parties but also relied upon the extensive submissions of affidavits and evidence by the Respondent. Petitioner submitted no affidavits or evidence.

SUMMARY OF REASONS FOR DENYING PETITIONER'S REQUEST

The issues raised by Petitioner simply attempt to retrace previous decisions of this Court and somehow distinguish the facts sufficiently to justify a different legal conclusion than this Court has ever previously reached. The recent rulings of this Court consistently uphold the ruling challenged here, that a Tribal member's income derived from Indian Country employment and that property owned by a tribal member in Indian Country are, absent contrary federal statutes, exempt from state taxation. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), *Potawatomi, Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).

> In the special area of state taxation of Indian tribes and tribal members, we have adopted a *per se* rule. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083, 1091 fn. 17 (1987).

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985).

Further, the Court has consistently held that Indian Country, as defined in 18 U.S.C. § 1151, is the territorial component for the exclusion of State authority concerning Indians and their property regardless of which component of the tripartite Indian Country definition a particular tract of land satisfies, *DeCoteau v. District Court*, 420 U.S. 425 (1975); *United States v. John*, 437 U.S. 634 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975). Petitioner attempts to reargue this Court's decisions regarding reservations and other forms of Indian Country. Despite the Court's mandate in *Potawatomi* (at page 910) "that the test for determining whether land is Indian Country does not turn upon whether that land is denominated 'trust' or 'reservation'," Petitioner mistakenly focuses upon reservation status when it is actually the classification as Indian Country that has the effect of excluding state jurisdiction. Respondent asserts that regardless of the status of its lands as reservation, the Indian Country classification falls squarely within prior Supreme Court rulings and thus excludes state taxation of Respondent's members income and property.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE PER SE RULE PROHIBITING STATE TAXATION OF INDIANS AND THEIR PROPERTY WAS PROPERLY FOLLOWED BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AS TO THE PROPERTY AND INCOME OF SAC AND FOX TRIBAL MEMBERS IN SAC AND FOX INDIAN COUNTRY.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court recognized that the federal law imposed a *per se* rule prohibiting state taxation of Indian Tribes absent the express consent of Congress. Contrary to the Oklahoma Tax Commission's position, the normal rules in tax cases do not apply when Indians or Indian property are involved. In fact, the rules for state taxation in the Indian Country are exactly the opposite of the normal taxation rules. Specifically, the Constitution vests the Federal Government with exclusive authority over relations with Indian Tribes. Indian tribes and individuals are thus generally exempt from state taxation within their own territory. As the Court stated in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985):

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to

> such taxation; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. (Citations omitted.)

The cases prohibiting state taxation of Indians within Indian Country in the absence of unmistakable authorization from Congress are legion. *Bryan v. Itasca County,* 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987); *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexicō,* 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Commission,* 448 U.S. 160 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980).

Clearly the *per se* rule of *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987) and *Montana v. Blackfeet Tribe,* 471 U.S. 759, 765 (1985) remain applicable to Indian tribes in general, and the Sac and Fox Nation in particular. The corollary to this rule is that it was incumbent upon the Oklahoma Tax Commission to plead and prove specific unambiguous congressional authority both to levy and collect the particular taxes at issue. *See, County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985); *National Farmers Union Ins. Co. v. Crow Tribe,* 471 U.S. 845, 852 (1985). Petitioner did not do so.

The Tenth Circuit ruled "that direct state taxation of tribal property or the income of a tribal member earned solely on a reservation is *presumed* to be preempted,

absent express congressional authorization." (Emphasis added.) Petitioner's Appendix at A-3. This is well in line with this Court's ruling in *McClanahan*:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by an act of Congress.

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 170-171 (1973).

The tribal member income at issue in this Petition is earned within Indian Country, and the state's motor vehicle tax is a tax on the fair market value of tribal member's personal property principally stored within the Indian Country. The state's vehicle tax is not logically related to road use and the federal government's interest in establishing strong tribal governments is at its strongest. The economic burdens of these taxes are passed on to the tribal member's dwelling in the Indian Country.

At a minimum, there has never been any case which has held that a state may tax tribal members within any part of Indian Country where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the state's taxing power. The most recent Supreme Court ruling continues to recognize this distinction. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe,* ___ U.S. ___, 111 S.Ct. 905 (1991). In *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission,* 829 F.2d 967 (10th Cir. 1987), the court stated:

. . . the State cites broad dicta in *United States v. Hester* . . . in support of its proposition that Oklahoma has "complete civil and criminal jurisdiction over all citizens residing within the state . . . the present case does not involve, nor does the Tribe challenge, Oklahoma's jurisdiction over its Indian citizens outside of *Indian Country*. Moreover, *Hester* involved the authority of the state to tax a restricted Indian allotment pursuant to a specific act of Congress passed in 1928.

Oklahoma's jurisdictional theory apparently dates back to the early days of statehood. At the time, state officials and non-Indian citizens attacked federal restrictions on the alienability of Indian property by arguing that once the Indians received United States and Oklahoma citizenship, the federal government lost its authority to treat them or their land differently. (Emphasis added.)

Id. at p. 980, footnote 6.

Petitioner, Oklahoma Tax Commission relies on *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). This case is inapplicable for two reasons. First, *Oklahoma Tax Commission v. United States* does not involve a tribal government with a taxation system working toward less dependence upon outside sources. The *Oklahoma Tax Commission* case dealt with the Five Civilized Tribes whose taxing powers and other significant powers of self-government had been abolished by Act of Congress. The Five Civilized Tribes not only have different treaties but they did not have taxing governments in place to raise the issue of infringement. It has never been held that the

taxing powers of the Sac and Fox Nation were abolished. In fact the Petitioner admits the Sac and Fox may tax.

Second, *Oklahoma Tax Commission*, as well as other cases Petitioner relies on, was decided before *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams v. Lee* the Court held that state law must fail if it interferes with tribal government. Imposition of state taxation upon Sac and Fox members hinders the Nation's tax collection efforts, and violates the governmental rights of the Sac and Fox Nation secured by the *Treaty of January 9, 1789*, 7 Stat. 28, and never yet superseded.

II. PETITIONER'S RESERVATION ARGUMENT IS AT BEST IRRELEVANT AND AT WORST A RED HERRING

The argument for review boils down to the unsupported assertion that the Respondent no longer has a reservation, and therefore the lands that are held in trust by the United States for it and its members, and classified as Indian Country by this Court in *Potawatomi*, pursuant to 18 U.S.C. § 1151, is in fact not really Indian Country. What the Petitioner still fails to accept after numerous rulings by this Court is that whether or not the land is classified as a reservation does not effect whether the land is Indian Country. Reservation land is merely one of the categories of land which comprise Indian Country. *See* 18 U.S.C. § 1151.[1] Within the whole set, the three subsets,

[1] § 1151. Indian Country defined. Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the

namely reservations (§ 1151(a)), dependent Indian communities (§ 1151(b)), and allotments (§ 1151(c)), are coequal. Any distinction among the three centers on how the land came to be classified as Indian Country. Thus, while Petitioner may have an argument that Respondent's original reservation in Oklahoma was disestablished, whether the Respondent's original reservation was or was not disestablished is irrelevant to the arguments made by the Petitioner concerning Petitioner's right to tax Respondent's members within Respondent's Indian Country. The ultimate goal of the now discredited allotment policy was undoubtedly extinguishment of tribal sovereignty and eventual destruction of the reservation, but that was certainly not achieved. While citing *County of Yakima v. Yakima Indian Nation*, 112 S.Ct. 683 (1992), for the foregoing proposition, the Petitioner misses the fact that this Court also recognized the continuing existence of both the Yakima Nation and the Yakima reservation.

By citing to this Court's statements in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) that "there is a significant geographical component to tribal sovereignty"

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limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.)

Petitioner hopes to somehow create a distinction between reservations and allotments. Again this Court's recent decision in *Potawatomi* directly answers the Petitioner:

> Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed. 2d 489 (1978), we stated that the test for determining whether land is Indian Country does not turn on whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the government.'

Potawatomi at 910. Thus the significant geographic factor in this case is the existence of Indian Country. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), is not to the contrary. The ski resort at issue in *Mescalero* was not merely off reservation, it was leased by the tribe instead of being either owned by or held in trust for the tribe. Thus the land did not constitute Indian Country.

The Petitioner also states as an article of faith that the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749, destroyed the Sac and Fox Reservation, absent any express language to that effect in the Allotment Act, and that the fact of allotment destroyed the Sac and Fox Government and gave Oklahoma complete jurisdiction, a position generally rejected in *Mattz v. Arnett*, 412 U.S. 481 (1973) and *United States v. Nice*, 241 U.S. 591 (1916). However, Congress expressly reserved, in Section 1 of the Oklahoma Organic Act of May 2, 1890, 26 Stat. 81, and again in Sections 1 and 3 of the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267

(enacted after the Sac and Fox Allotment Agreement), its complete and exclusive authority over the persons, property and other rights of Indians "by treaties, agreement, law or otherwise."

The intent of the Oklahoma Organic Act with respect to the Indian tribes, and therefore that of the Oklahoma Enabling Act which contains substantially the same language, is illustrated by an exchange between Congressmen Mansur and Turner during the floor debates. The purpose of the Oklahoma government vis-a-vis the Indian tribes and their territory was explained as follows:

> MR. MANSUR: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?
>
> MR. TURNER: But I suggest to the gentleman that this is no longer a reservation, but a Territory.
>
> MR. MANSUR: But I desire to remind the gentleman that, as this bill expressly declares, *this Territorial government or organization is not for any Indian reservation whatever; it does not apply to Indian reservations.*

51 Cong. Rec. 2104 (1890) (remarks of Mssrs. Mansur and Turner) (emphasis added). Perhaps in part because the allotment agreements were than being negotiated, Congressman Mansur emphasized that the Indian tribes and their reservations were to be unaffected by the creation of Oklahoma:

> I challenge any gentleman on this floor – I care not who he is – to take any one of the first twenty-four sections of this bill [the Sections

relating to Oklahoma Territory] and show where it touches a red man at all. I repeat, for I would like to have it understood, that the first twenty-four sections of this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first twenty-four sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation. . . .

Now, as to every Indian reservation within the whole limits of the Indian territory as now organized, we say expressly that those first twenty-four sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that as to every Indian tribe and as to the land of every Indian tribe, none of these twenty-four sections which apply to the white people shall operate.

Id. at 2176.

The Oklahoma Enabling Act, the federal statute authorizing the creation of the State, *ab initio*, preempted Oklahoma taxation of Indian Country Indians by requiring:

> That nothing contained in the said constitution shall be construed to limit or impair the rights of . . . Indians . . . or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.

Act of June 16, 1906, § 1, 34 Stat. 267 (1906), and further:

> Third: That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States.

Notwithstanding the claims of the Oklahoma Tax Commission to the contrary, it appears that the proponents of the bills creating the State of Oklahoma did not think they had to destroy tribal government or Indian reservations or grant the then new State jurisdiction over either the Indians or their Indian Country in order to accomplish their purpose.

CONCLUSION

Wherefore, Respondent prays that the Oklahoma Tax Commission's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION, *Petitioner,*

v.

SAC AND FOX NATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 10, 1992
CERTIORARI GRANTED NOVEMBER 9, 1992

In The

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OKLAHOMA TAX COMMISSION, *Petitioner,*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

COMPLAINT

Plaintiff for its claim for injunctive relief against Defendant alleges and states:

PARTIES

1. Plaintiff Sac and Fox Nation, hereinafter referred to as the "Sac and Fox" is a federally recognized Indian tribe, having a government to government relationship with the United States established and governed by treaty. The capital of the Sac and Fox Nation is located near Stroud, within the boundaries of Lincoln County, State of Oklahoma, and the Sac and Fox Nation is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. 501 et seq., and the Indian Reorganization Act, 25 U.S.C. 461 et seq. The Sac and Fox Nation brings this action on behalf of itself and all residents of its territorial jurisdiction.

2. Defendant Oklahoma Tax Commission is an agency of the State of Oklahoma charged with the administration and enforcement of the state tax laws generally, and the state tax laws relative to motor vehicles and income taxes in particular.

JURISDICTION AND VENUE

3. Jurisdiction is conferred upon this court pursuant to 28 U.S.C. 1331, 28 U.S.C. 1345, and 28 U.S.C. 1362 in that this action arises under the Constitution and laws of the United States; the Oklahoma Indian Welfare Act of 1936, 25 U.S.C.A. 501 et seq.; the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq.; the Federal Common Law; and the treaties between the United States and the Sac and Fox as hereinafter more fully appears. Plaintiff submits to this Court's jurisdiction for the limited and sole purpose of securing the injunctive relief prayed for herein.

4. Venue lies in this district pursuant to 28 U.S.C. 1391(b) as the acts of Defendant complained of occurred within this district and Defendant resides within this district and within the State of Oklahoma within the meaning of the venue statutes.

ALLEGATIONS

5. Since time immemorial, the Sac and Fox Nation has been a people having the power to make their own laws and enforce them exclusive as to any state and this right has been repeatedly recognized and confirmed by the federal government.

6. The Sac and Fox Nation has created and maintained an agency of the Sac and Fox known as the "The Sac and Fox Tax Commission" which is charged with the administration of the tax laws of the Sac and Fox, including the tribal tax laws relating to and levying taxes upon motor vehicles and income or earnings.

7. The federal common law and the numerous treaties and agreements between the Sac and Fox and the United States guarantee to and recognize in the Sac and Fox the exclusive powers of self-government over both their members and other persons and property within their territory.

8. The Constitution, laws, and treaties between the Sac and Fox and the United States of America are the supreme laws of the land and exclusively controls the relationship between the United States and the Sac and Fox.

9. The actions of the Defendant herein complained of are unlawful, unconstitutional, and illegal in that federal law pre-empts all purported authority of the State of Oklahoma, its agencies, officers, or employees, to act in the manner as described in this complaint.

10. The actions of the Defendant herein complained of are unlawful, unconstitutional, and illegal in that such actions interfere with the federally protected right of the Sac and Fox Nation to govern itself, and all persons and property within its territory.

11. That the territorial jurisdiction of the Sac and Fox Nation includes all Indian Country of the Sac and Fox Nation as defined in 18 U.S.C. 1151, including without limitation the Sac and Fox Indian Reservation and all parts thereof not extinguished by treaty or act of Congress, and all lands added thereto, all Sac and Fox Indian trust allotments, and all lands owned by the Sac and Fox Nation or its agencies whether in trust or in fee restricted by U.S.C. 177.

12. Upon information and belief, Defendant while acting under color of the laws of the State of Oklahoma, and the state tax laws in particular, has subjected Plaintiff, and the residents of Plaintiff's jurisdiction, as citizens of the United States and persons within the jurisdiction thereof, to the deprivation of the Sac and Fox Nation's treaty protected rights and privileges of self-government, and the immunity from the exercise of state jurisdiction over all property and persons within the territorial jurisdiction of the Sac and Fox secured by the federal Constitution, the treaties between the United States and the Sac and Fox, and other federal law.

13. Upon information and belief, Defendant and other persons unknown to Plaintiff, under color of state law, have acted in concert and conspired together to deprive Plaintiff, and those persons residing within Plaintiff's territorial jurisdiction, of the equal protection of the laws in that such persons are singled out for harassment, coercion, and intimidation for exercising the privileges and immunities guaranteed to them by federal law, and have been prevented by such action from exercising such rights.

14. That in each case herein complained of, Defendant has unlawfully and without due process of law taken or attempted to take money or other property from Plaintiff and residents of Plaintiff's territorial jurisdiction, under color of the state tax laws.

15. That in each case herein complained of, Defendant has unlawfully and in violation of the Indian Commerce Clause of the United States Constitution, and federal laws enacted pursuant thereto, illegally interfered with commerce with the Plaintiff and its residents.

16. Plaintiff has and will suffer immediate and irreparable injury and a multiplicity of lawsuits if the injunctive relief sought herein is not granted and Plaintiff has no adequate remedy at law.

17. Defendant has no rational nexus for the levy or collection of any of the taxes herein as described in this complaint.

FIRST CLAIM FOR RELIEF

18. Paragraphs 1 - 17 are incorporated herein.

19. Among the duties of the Sac and Fox Tax Commission is the duty to administer the laws of the Sac and Fox Nation relating to issuing titles for, registration and taxation of, and placing license tags upon motor vehicles, mobile or manufactured homes, trucks, motor cycles, and similar powered conveyances, owned by residents of, and primarily garaged within the territorial jurisdiction of the Sac and Fox.

20. The Sac and Fox Tax Commission, acting for the Sac and Fox Nation, has issued titles and registrations for, placed license plates on, and collected tribal taxes upon certain motor vehicles, mobile or manufactured homes, and similar powered conveyances.

21. The Sac and Fox, and residents of the Sac and Fox jurisdiction, own motor vehicles upon which tribal taxes due have been paid and which bear license plates and have titles issued by the Sac and Fox. These titles and license plates have been ruled valid by the Oklahoma State Courts which found no state taxes to be due.

22. That without authority of law, and in violation of the rights and immunities recognized in or granted to Plaintiff by the federal common law relating to Indian tribes in general, and the treaties with the Sac and Fox in particular, the Defendant has and is attempting to apply the laws of the State of Oklahoma to tax, license, register, and title the motor vehicles and other conveyances more particularly described above.

23. That in unlawfully attempting to enforce the laws described above, and in unlawfully attempting to prevent the legal taxation by the Sac and Fox upon Sac and Fox residents, the Defendant, or its agents or servants, has coerced and harassed residents of the Sac and Fox Nation when said residents have made or attempted to make commercial transactions with residents of the State of Oklahoma, and Defendant has harassed residents of the State of Oklahoma in an attempt to prevent commercial transactions from taking place with Sac and Fox residents which have paid motor vehicle taxes to the Sac and Fox Tax Commission.

24. That in unlawfully attempting to enforce the laws described above, and to otherwise prevent the lawful taxation by the Sac and Fox Nation of its residents, the Defendant, or its agents or servants, has refused to issue Oklahoma titles and license plates for vehicles titled and tagged by the Sac and Fox upon the sale of such vehicles to persons not residing within the jurisdiction of the Sac and Fox Nation, or when the owner thereof moves to a location outside the territorial jurisdiction of the Sac and Fox, until and unless the owner, purchaser, or prior owner pay to them monies for the time said vehicles were titled and tagged by the Sac and Fox Nation even though no taxes or fees for such period are due; and that Defendant does not collect taxes and harass similarly situated citizens from jurisdictions such as Texas, Kansas, and other states located within the United States.

25. That these discriminatory actions taken and threatened by the Defendant as herein described will cause residents of the Sac and Fox jurisdiction to evade or avoid payment of tribal taxes and compliance with tribal law; and that residents of the Sac and Fox jurisdiction will be forced to travel outside of Oklahoma to

engage in commerce.

26. That the course of action taken by Defendant, including the collection of monies for payment of purported state taxes upon such vehicles have injured the Plaintiff by unlawfully depriving Plaintiff and its residents from exercising their rights and privileges to travel, engage freely in commerce in the United States, and deprivation of property and liberty without due process of law.

27. The conspiracy and action taken by Defendant, and upon information and belief, as formal or informally decided State, department, or commission policy have resulted in damage to Plaintiff and unlawfully interfered with Plaintiff's right to govern, and are outside the scope of Defendant's authority for the reasons stated herein.

28. Unless Defendant is enjoined from interfering with Plaintiff's right to tax and the Plaintiff's citizens' rights to engage in commerce with citizens of the United States, Plaintiff will sustain substantial and irreparable injury to its right to self-government.

SECOND CLAIM FOR RELIEF

For its second claim for relief the Plaintiff alleges and states as follows:

29. Paragraphs 1 - 17 are incorporated herein.

30. The Sac and Fox Nation has and continues to pay its officers and employees for their services and other duties performed for the Nation primarily within the Sac and Fox jurisdiction.

31. Other employers pay residents of the Sac and Fox territorial jurisdiction for their services and other duties performed for their employees primarily within the Sac and Fox jurisdiction.

32. The Sac and Fox Nation has levied a tax upon earnings of employees as defined by the laws of the Sac and Fox Nation, and such tax is administered and collected by the Sac and Fox Commission.

33. Defendant is and continues to unlawfully attempt to require employees to pay money for state income taxes which

they claim to be due on compensation paid by the Nation and other employers for such services within the Sac and Fox jurisdiction, without either civil or criminal jurisdiction to do so, and in violation of Plaintiff's rights to due process of law.

34. Defendant is and continues to unlawfully attempt to require officers and employees of Plaintiff and other employers to pay them money for state income taxes which they claim to be due on such compensation paid to employees without either civil or criminal jurisdiction to do so in violation of Plaintiff's and such person's rights to self-government and due process of law.

35. That the action taken and threatened by Defendant as herein described has caused some residents and persons earning or paying compensation within the Sac and Fox jurisdiction to evade or avoid payment of tribal taxes and compliance with tribal law.

36. The conspiracy and action taken by Defendant upon information and belief as formally or informally decided state, department, or commission policy has resulted in injury to Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment:

A. Declaring that the Oklahoma Tax Commission has no authority to:

(1) enforce its motor vehicle laws relating to titles, registration, and taxation of motor vehicles owned by residents of, and principally garaged within, the Sac and Fox jurisdiction, or to refuse to recognize the Sac and Fox titles, registrations, tags, and other motor vehicle laws as valid, or to require payment of Oklahoma taxes and fees for the period such motor vehicles were located within the Sac and Fox jurisdiction, or to refuse to issue titles, tags and other Oklahoma documents to purchasers of such vehicles or to those who move outside the Sac and Fox jurisdiction.

(2) levy or collect any tax upon the income of persons residing within the jurisdiction of the Sac and Fox or persons earning income within the jurisdiction of the Sac and Fox.

B. Upon a final hearing and determination that the Court issue a permanent injunction enjoining Defendant, and its agents, servants, employees, attorneys and all persons in active concert and participation with them from:

(1) Applying, attempting to apply, or enforcing, or attempting to enforce its motor vehicle laws relating to titles, registration, or taxation of motor vehicles owned by residents of, and principally garaged within, the Sac and Fox jurisdiction, or from attempting to collect taxes on such vehicles for the time period with which they were registered within the jurisdiction of the Sac and Fox Nation, or to refuse to issue titles, tags and other Oklahoma documents to purchasers of such vehicles outside the Sac and Fox jurisdiction until a tax is paid to Oklahoma for period such motor vehicles were located within the Sac and Fox jurisdiction.

(2) Enjoining the State of Oklahoma and the Oklahoma Tax Commission from taxing the income of persons who have earned their income within the jurisdiction of the Sac and Fox Nation, or the income of persons who reside within the jurisdiction of the Sac and Fox Nation.

Respectfully submitted,

_____

G. William Rice, OBA#007539
G. WILLIAM RICE, P.C.
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Cushing, OK 74023
(918) 225-4800

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

ANSWER

COMES NOW the Defendant and for its answer alleges and states:

1. Defendant admits that the Sac and Fox Nation ("Tribe" hereafter) is a federally recognized Indian tribe. Defendant admits that the tribal capital is located near Stroud, within the State of Oklahoma, County of Lincoln, and the tribe is organized pursuant to federal law, 25 U.S.C. 501 et seq. and/or 25 U.S.C. 461 et seq.

2. Defendant admits that it has been properly designated in the complaint as the state agency charged with administration of tax laws.

3. Defendant admits that this Court properly has jurisdiction in this case pursuant to 28 U.S.C. 1362.

4. Defendant admits that venue is properly before this Court.

5. Defendant admits that this Tribe has a right to make its own laws and be ruled by them but denies that the Tribe may enforce its laws to the exclusion of State laws and denies that tribal laws may be enforced against non-members.

6. Defendant has no knowledge of Commissions within the tribal government of the Sac and Fox Nation and has no knowledge of tribal tax laws enacted by the Tribe and can neither

admit nor deny allegation 6 in the Complaint.

7. Defendant denies that the Tribe maintains exclusive powers of self-government over both tribal members and non-members anywhere within the State of Oklahoma.

8. Defendant admits that the Constitution, laws and treaties of the United States of America are the supreme laws of the land pursuant to the Constitution of the United States, Article VI clause (2). Defendant denies any allegation that the Tribe or its members are not responsible to comply with State laws within Oklahoma where no Indian reservations exist.

9. Defendant denies that it has taken any actions which are illegal or unconstitutional and denies that federal law has pre-empted State laws of taxation.

10. Defendant denies that it has taken any actions which are illegal or unconstitutional and denies that it has taken any actions which would interfere with the Tribe's rights to govern itself.

11. Defendant denies the existence of a Sac and Fox Indian Reservation and alleges that no Indian reservation as that term is defined in 18 U.S.C. 1151(a), exists in Oklahoma. Defendant denies the existence of any "territorial jurisdiction of the Sac and Fox Nation" within the State of Oklahoma. Defendant alleges that the Tribe maintains jurisdiction over the tribal members only as to tribal matters.

12. Defendant denies that it has deprived the Tribe's rights to self-government by enforcement of State tax laws and denies that the federal laws and Constitution provide any immunity to State citizens from State tax laws and therefore denies that anyone's rights to such an immunity has ever been denied by the Tax Commission's law enforcement.

13. Defendant denies that it has conspired to deprive Plaintiff or any of its members or other people from equal protection of the laws and denies that it has harassed, coerced or intimidated anyone.

14. Defendant denies that it has unlawfully and without due process of law taken or attempted to take money or property from Plaintiff or other persons.

15. Defendant denies that it has taken any action against the

Plaintiff or others in violation of the Indian Commerce Clause of the United States Constitution or illegally interfered with the Plaintiff's commerce with other people.

16. Defendant denies that Plaintiff has suffered any injury capable of redress in this Court.

17. Defendant denies that it has no rational nexus to tax citizens within the State of Oklahoma.

FIRST CLAIM

18. See paragraphs 1 - 17.

19. Defendant has no knowledge of the duties of the Sac and Fox Commission and therefore neither admits nor denies this allegation.

20. Defendant has no knowledge of taxes collected by the Sac and Fox Tax Commission and neither admits nor denies this allegation.

21. Defendant has no specific knowledge of motor vehicles owned by the Tribe or other people nor does the Defendant know whether tribal taxes have been paid and neither admits nor denies this allegation. Defendant denies that these "titles and license plates" have been ruled "valid" by the Oklahoma State Courts which found "no state taxes to be due".

22. Defendant admits that it does enforce its motor vehicle tax laws against the citizens of this State and concerning motor vehicles and transactions in this State but denies that this enforcement is without authority of law or in violation of any law.

23. Defendant denies that its tax enforcement is unlawful and denies that it has prevented the Tribe from collecting its own taxes or has coerced or harassed anyone.

24. Defendant admits that it refuses to issue titles or licenses to motor vehicles until all delinquent taxes which are due and owing are paid, regardless of whether tribal taxes have been previously paid. Defendant admits that it issues transfer titles to motor vehicles previously titled and tagged in other states upon the payment of current registration fees, however, those out-of-state vehicles are not similarly situated to vehicles which are only

tribally tagged or titled.

25. Defendant denies that its actions are discriminatory or an interference to the Tribe's own tax enforcement because the State's tax laws apply to all citizens of the State and the enforcement of tribal laws are the sole responsibility of the Tribe.

26. Defendant denies that its actions have deprived the Tribe's rights to travel or engage in commerce and Defendant denies that its actions have deprived the Tribe of property and liberty without due process.

27. Defendant denies that its actions have resulted in any damage to the Tribe and denies that it has interfered with Plaintiff's right to govern.

28. Defendant denies that the Tribe will sustain any injury or damage due to State taxation of the citizens of this State.

SECOND CLAIM

29. See paragraphs 1 - 17.

30. Defendant admits the Tribe pays its employees for their services but denies the existence of a "Sac and Fox jurisdiction".

31. Defendant admits that other employers in Oklahoma pay their employees for services performed but denies the existence of a "Sac and Fox jurisdiction".

32. Defendant has no knowledge of tribal tax laws or administration and neither admits or denies allegation 32.

33. Defendant admits that it does attempt to collect income tax from citizens of this State but denies that the State income tax laws are unlawful or in violation of the Tribe's rights.

34. Defendant admits that it does attempt to collect income tax from persons who earned income as tribal officers or employees but denies that the application of State tax laws to tribal officers or employees is unlawful or in violation of the Tribe's rights to self-government or due process of law.

35. Defendant has no knowledge of whether or not anyone who may be subject to tribal tax laws is evading those tribal laws and neither admits nor denies allegation 35 but concludes that tribal tax collection is the sole responsibility of the Tribe.

36. Defendant denies that it has taken any action that resulted in injury to the Tribe.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for judgment denying the Tribe any and all declaratory and injunctive relief requested in the complaint.

DATED this 4th day of October, 1990.

Respectfully submitted,
JOE MARK ELKOURI
GENERAL COUNSEL

David Allen Miley, OBA#11933
Assistant General Counsel
OKLAHOMA TAX COMMISSION
2501 Lincoln Boulevard
Oklahoma City, OK 73194-0011
(405) 521-3141

Certificate of Mailing Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,)
)
Plaintiff,)
)
v.) CIV-90-1553 A
)
THE OKLAHOMA TAX COMMISSION,)
)
Defendant.)

PRELIMINARY STATUS REPORT

Date of Conference: November 8, 1990.

Appearances: G. William Rice, Brent Parmer, Gregory H. Bigler, Cushing, OK, for Plaintiff; David A. Miley, Oklahoma City, OK, for Defendant

I. A. BRIEF PRELIMINARY STATEMENT

FIRST CLAIM

Plaintiff is a federally recognized Indian Tribe. Defendant is the tax collection agent for the State of Oklahoma. Plaintiff, in an attempt to raise revenue for the operation of its government, levies a tax upon motor vehicles which are principally garaged in its jurisdiction -- trust land owned by members of the Nation. Plaintiff issues Certificates of Title and License Tags (registration) to those paying the motor vehicle tax.

Defendant, through its various agents, refuses to recognize Certificates of Title and License Tags issued by the Plaintiff. Unlike an out-of-state title, which is treated as a negotiable instrument, Defendant demands that back taxes be paid by any individual desiring to have the Plaintiff's Certificates of Title

exchanged for Defendant's (Oklahoma) Certificates of Title. This action discourages residents taxed in Plaintiff's jurisdiction from trading for or purchasing vehicles owned by dealers or residents within the Defendant's jurisdiction.

Although Defendant will not recognize Plaintiff's Certificates of Title and License Tag Registrations, there are no attempts by Defendant to collect taxes on vehicles owned by residents within Plaintiff's jurisdiction until the point of trade, sale, or exchange of the motor vehicle. Plaintiff contends that Congress never authorized the State of Oklahoma to tax residents within the Indian Country subject to Plaintiff's jurisdiction, including the Sac and Fox reservation. Defendant contends that there are no reservations in Oklahoma, and it may tax any individual within the boundaries of the State of Oklahoma as long as no Indian Reservation exists.

SECOND CLAIM

Plaintiff levies taxes upon earnings of employees working within Plaintiff's jurisdiction. Defendant attempts to tax the earnings of said individuals working within Plaintiff's jurisdiction within the exterior boundaries of the State of Oklahoma. The taxation by Defendant discourages the payment of tax to Plaintiff and discourages people from becoming employed by Plaintiff.

Plaintiff contends that Congress has never authorized the State of Oklahoma or any of its agents to tax the earnings of individuals employed within the Indian Country subject to Plaintiff's jurisdiction, including the Sac and Fox reservation. Defendant contends it has a lawful right to collect taxes upon those employed by the Plaintiff or otherwise employed within Plaintiff's jurisdiction within the exterior boundaries of the State of Oklahoma.

B. SUGGESTED VOIR DIRE QUESTIONS.

Non-jury trial. No voir dire questions are necessary.

II. STIPULATIONS

A. All parties are properly before the Court;
B. The Court has jurisdiction of the parties and of the subject matter;
C. There is no question as to misjoinder or nonjoinder of the parties;
D. All parties have been correctly designated;
E. Facts:

First Claim

1. Plaintiff is a federally recognized Indian tribe located within the boundaries of the State of Oklahoma.
2. Defendant is the Oklahoma Tax Commission.
3. Plaintiff taxes the ownership of motor vehicles if those vehicles are principally garaged on trust land, tribally owned land, or restricted allotments located within the Sac and Fox Reservation or within "Indian Country" under the jurisdiction of the Sac and Fox Nation.
4. Plaintiff issues Certificates of Title and Registration Certificates to owners of motor vehicles which are taxed by the Plaintiff.
5. Persons possessing motor vehicles having registration and title certificates issued by the Plaintiff often trade or sell those motor vehicles to individuals located outside the Plaintiff's jurisdiction and within the State of Oklahoma.
6. The District Court of Lincoln County, State of Oklahoma, has previously ruled upon the question of State taxation of motor vehicles titled and registered by the Sac and Fox. See Exhibit A attached.
7. Defendant continues to require payment of money equivalent to the taxes, penalties, and interest it would have imposed upon a motor vehicle during the time it was taxable by the Sac and Fox

Nation as a prerequisite to issuance of Oklahoma title and registration documents when Tribally titled and registered motor vehicles are sold, traded, or otherwise removed from the Indian Country of Plaintiff.

Second Claim

1. Plaintiff and other employers within the Sac and Fox jurisdiction pay employees for their services.
2. Most of Plaintiff's employees are members of the Sac and Fox Nation, but some employees are non-member Indians and non-Indian.
3. Plaintiff taxes the earnings of persons employed within the Sac and Fox jurisdiction.
4. Defendant is attempting to tax the earnings of employees within the Sac and Fox jurisdiction within the exterior boundaries of the State of Oklahoma.

F. Legal Issues:

1. Has the original Sac and Fox reservation been diminished or disestablished by federal law?
2. Do the treaty stipulations between the Sac and Fox Nation and the United States, the federal common law, or the inherent authority of the Sac and Fox Nation preempt whatever authority the State might otherwise have within the Indian Country of the Sac and Fox Nation?
3. Does the Oklahoma Tax Commission have the authority to tax personalty and income within said jurisdiction?

G. Factual Issues:

No factual issues can be determined at this time.

III. CONTENTIONS

A. Plaintiff:

1. Facts:

(a) The Sac and Fox Reservation has not been disestablished by Congress.

(b) That even if no reservation exists; that the Sac and Fox Nation has the authority to levy tax upon motor vehicles garaged within "Indian Country" as defined by 18 U.S.C. 1151, and the Plaintiff may tax income within "Indian Country" also.

(c) The State of Oklahoma and its agencies are prohibited from taxing individual income earned, and personal property located within the jurisdiction of the Sac and Fox Nation by paramount federal law.

B. Defendant:

1. Facts:

(a) The Sac and Fox Reservation has been disestablished.

(b) There exists no area within which the United States or the Sac and Fox Nation may exclude the State of Oklahoma and its agencies from taxation upon individuals' earnings or personal property.

. EXHIBITS

A. Plaintiff:

Number	Title	Objection	Rule Relied Upon
1.	Map of Reservation		
2.	Tax Records of Nation		
3.	Dawes Commission Records		
4.	Memos from Oklahoma Tax Commission		
5.	Letters from Oklahoma Tax Commission		
6.	Sac and Fox Constitution		
7.	Sac and Fox Revenue Code and pertinent resolutions		
8.	Treaty of Fort Harmer		
9.	Record from the Lincoln County car tag case.		

B. Defendant:

Number	Title	Objection	Rule Relied Upon
1			

V. PRELIMINARY WITNESSES LIST

A. Plaintiff:

Name	Address	Proposed Testimony
Elmer Manatowa		That he is Chief of the Sac and Fox Nation, and receives remuneration wnich is taxed by the Defendant.
Gaylon R. Franklin, Sr.		That he is Second Chief of the Sac and Fox Nation and receives remuneration which is taxed by the Defendant. Further, he was a defendant in the Lincoln County car tag case and will testify regarding that case.
Truman Carter		That he is the Treasurer of the Sac and Fox Nation, and receives remuneration which is taxed by the Defendant. He will testify as to how revenues earned from taxes are used. Further, he was a defendant in the Lincoln County car tag case referred to above, and will testify regarding that case

Betty Wahpepah	That she is employed as the Tax Commissioner for Plaintiff and receives a salary which is taxed by the Defendant. That she collects money from taxes on motor vehicles and on earnings of individuals for the Plaintiff.
Jeanne Pound	She will testify that she is the Court Clerk for the Sac and Fox Nation. She will testify concerning the Court budget as well as the types of cases and case load of said court.
George Harjo	He will testify that he is the police chief for the Sac and Fox Nation and will give information about the police budget as well as the area for which his which his department is responsible.

B. Defendant:

Name	Address	Proposed Testimony

VI. TRIAL BRIEFS -- not completed at this time.

VII. ESTIMATED DISCOVERY AND TRIAL TIME

Four days for trial if stipulations can be made. It is estimated that three months will be needed for discovery.

VIII. POSSIBILITY OF SETTLEMENT

Good _____ Fair _____ Poor X

IX. POSSIBILITY OF COURT-ANNEXED ARBITRATION -- LO-CAL RULE 43

This case is not eligible for mandatory arbitration under 28 U.S.C. 652(a)(2) in that said statutes were not meant to apply to any federally recognized Indian tribe.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION, Plaintiff,	)	
v.	)	CIV-90-1553 A
THE OKLAHOMA TAX COMMISSION, Defendant.	)	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant, the Oklahoma Tax Commission, moves the Court to grant summary judgment in its favor against Plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is based on the ground that the pleadings and the Preliminary Status Report show that there is no substantial controversy as to any material fact and that Defendant may validly enforce its income tax and motor vehicle taxes against Sac and Fox tribal members, tribal employees and non-tribal members who live or work within the former Sac and Fox Reservation in Oklahoma. Therefore, the Oklahoma Tax Commission is entitled to judgment against the Sac and Fox Nation as a matter of law.

DATED this 6th day of February, 1991.

Respectfully submitted,
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Certificate of Mailing Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION, Plaintiff,	)	
v.	)	CASE NO. CIV-90-1553-A
THE OKLAHOMA TAX COMMISSION, Defendant.	)	

OKLAHOMA TAX COMMISSION'S

BRIEF IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

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ATTORNEY FOR:

OKLAHOMA TAX COMMISSION

February, 1990

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	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO SUBSTANTIAL CONTROVERSY.

The Defendant's admissions in the pleadings, the stipulations in the Preliminary Status Report and the exhibits attached hereto show that there is no substantial controversy as to any material fact presented in this litigation:

1. The Sac and Fox Nation, "Tribe" hereafter, is a federally recognized Indian tribe located within the State of Oklahoma, which is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. 501 et seq. The offices of the Tribal headquarters are located near Stroud, Oklahoma, on land held in trust by the United States Government for the benefit of the Tribe. (Petition 1, Answer 1).

2. The Oklahoma Tax Commission, "State" hereafter, is the State agency responsible for enforcing and administering State Tax laws, including State motor vehicle and income taxes. (Petition 2, Answer 2).

3. The Tribe imposes motor vehicle taxes and registration

requirements on its members who own motor vehicles. The Tribe also imposes income taxes on its members and on non-members who work for the Tribe. The State has never attempted to prevent the Tribe from imposing or enforcing these taxes, which the Tribe has the power to impose by virtue of its right to self-government. (Complaint 5, 19, 20, 32, Answer 5, 19, 20, 32, Preliminary Status Report Section II, subsection E).

4. The State imposes motor vehicle excise taxes on the transfer of ownership or use of a motor vehicle in this State pursuant to the Vehicle Excise Tax Act, 68 O.S. 2101 et. seq. The State also imposes annual registration fees on the registration of every vehicle in this State pursuant to the Oklahoma Vehicle License and Registration Act, 47 O.S. 1101 et. seq. The State also imposes an income tax on all residents and nonresidents who receive income in Oklahoma pursuant to the Oklahoma Income Tax Act, 68 O.S. 2351 et seq.

5. When an owner of a vehicle obtains a tribal title and license plate for that vehicle and does not obtain a title or license plate from the State, the State taxes applicable to that vehicle are considered to be delinquent by the State. When a subsequent owner of that vehicle applies to the State for a title and license plate, the subsequent owner must bring up the title on the vehicle by paying the current and delinquent excise taxes on the transfers of the vehicle, 47 O.S. 1133(H) and 68 O.S. 2103(A). Also, for years in which the owner used the vehicle in this State but did not pay annual State registration fees, the subsequent owner will be required to pay the current year's fee and the fees and penalties for one previous year under 47 O.S. 1115(E) in order to obtain a State license plate. [Preliminary Status Report Section II, subsection E(7)].

6. All tribal employees, whether tribal members or nonmembers, or any person who receives income for employment or work performed on tribally-owned land within Oklahoma are subject to pay Oklahoma income taxes. The State does attempt to assess and collect the income tax from such persons if they fail to report their income and pay those taxes pursuant to the Oklahoma Income Tax Act, regardless of whether or not those persons have

paid tribal income taxes. [Preliminary Status Report Section II, subsection E(4)].

STATEMENT OF ISSUES

The issues in this case are, first, has the original Sac and Fox reservation been diminished or disestablished by federal law? Second, this case involves whether the State motor vehicle and income tax laws infringe on the Tribe's right to govern itself or whether those State laws have been pre-empted by Federal laws.

ARGUMENT AND AUTHORITIES

A. THE SAC AND FOX RESERVATION NO LONGER EXISTS IN OKLAHOMA.

The issue of whether or not an Indian reservation exists in this case is drawn from the distinction made in the treatment of the companion cases of McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.C. 1257, 36 L.Ed.2d 129 (1973) and Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.C. 1267, 36 L.Ed.2d 114 (1973). In Mescalero, a tribally owned business operated off of the Tribe's reservation was subject to State gross receipts taxes because Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. In the McClanahan case, the Supreme Court found that an individual Navajo Indian who lived and earned her income entirely within the Navajo Reservation in Arizona was not subject to State income taxes because State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply.

This distinction stems from the Courts early decision in Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483 (1832), wherein the concept was developed that reservations were "distinct political communities, having territorial boundaries, within which their authority is exclusive." The Court found in McClanahan that it

followed from this concept of Indian reservations as separate, although dependant nations, that state law could have no role to play within the reservation boundaries. Therefore, the Supreme Court held at 411 U.S. 181 that with regard to the application of State laws, "the question has always been whether the State action infringed on the right of reservation Indians to make their owns laws and be ruled by them," (the Court's emphasis) quoting Williams v. Lee, 358 U.S. 217, 79 S.C.269, 3L.Ed. 2d 251 (1959).

In McClanahan, the Supreme Court began its analysis with the treaty which the United States entered with the Navajo Nation in 1868 to provide a reservation for the use and occupation of the Navajo. Although the treaty nowhere states that the Navajo's would be exempt from State taxes, the Supreme Court interpreted the treaty to preclude extension of State law to the Indians because the treaty was intended by the Government to establish an exclusive federal reservation under general federal supervision. State taxes were not applicable to tribal members on the reservation in the McClanahan case because Congress intended to provide a reservation for the Tribe to develop a separate community apart from the general community of the state so that they could make their own laws and be ruled by them. Application of State laws would impermissibly infringe that right. However, the Court closely tailored the decision in McClanahan to the reservation situation and the Court recognized that the decision was not applicable to off-reservation situations. In fact, in the Williams case, supra, the Court found at note 6, 358 U.S. 221, that Congress had granted extensive jurisdiction over Oklahoma Indians to the State as outlined in the Solicitor General's treatise for the Department of Interior, Federal Indian Law (1958) at 985-1051. Congress did not intend to maintain reservations in Oklahoma but instead embarked on a policy of assimilation of the tribes in Oklahoma.

The treatment of Indian tribes in the former Indian Territory, now Oklahoma, was much different than that of the Navajo experience. The Sac and Fox Nation was removed to Indian Territory where a reservation was established for the Tribe by the Federal Government in the latter half of the Nineteenth Century. At that time the Indian Territory consisted entirely of contiguous

Indian reservations belonging to numerous tribes. However, beginning with the passage of the General Allotment Act in 1887, 24 Stat. 388, the Indian reservations were allotted in severalty to tribal members with the remaining unallotted lands to be purchased by the Government and thrown open to homesteading.

Many reservations in Indian Territory were disestablished under the General Allotment Act, but that Act was, by its terms, inapplicable to the Osage Tribe and the Five Civilized Tribes in Oklahoma. Congress enacted the Dawes Commission Act, 27 Stat. 612, in 1893 for the purpose of extinguishing the tribal titles to the land of the Five Civilized Tribes, either by cession or allotment, with a view to the ultimate creation of a state to embrace the lands within the territory. This was a comprehensive program by the Federal Government to politically reconstruct the Territory. The case of Woodward v. DeGraffenried, 238 U.S. 284, 35 S.C. 764, 59 L.Ed.1310 (1915), details the efforts of Congress to organize the Territories for Statehood and cites the annual reports of the Dawes Commission in its efforts to further the policy of Congress toward disestablishing the tribal reservations in note 1 at 238 U.S. 296, and note 2, 238 U.S. 299.

From the mid-1890's until Oklahoma Statehood in 1907, the Federal Government spent great sums of money and energy in the reconstruction of Indian Territory by disestablishing all of the reservations through allotment in order to replace the several tribal governments with a constitutional State government capable of admission into the union on an equal footing with the original states. It was against this background that Congress affirmed and ratified the cession agreement with the Sac and Fox. The Sac and Fox reservation was ceded to the United States under the Act of February 13, 1891, 26 Stat. 749. This agreement specifically states that, "the Sac and Fox Nation hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to ... " the following described reservation. The reservation was opened to settlement by Presidential Proclamation at 27 Stat. 989.

Many Tribes objected to the disestablishment of their reservations, such as the case of Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.C. 217, 47 L.E. 299 (1903), where the Kiowa Tribe asserted that the treaties which created their reservation stipulated that the reservation would not be disestablished and included within a state without their consent. The Supreme Court found that Congress had the Constitutional power to abrogate the provisions of an Indian treaty unilaterally, and the exercise of that power was valid in this case. The Court stated:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

It can be seen that these Tribes were treated much differently than tribes in other States such as the Navajo Tribe in the McClanahan case. From the tenor of these legislative reports and the actions of Congress at the turn of the century, it is clear that the Federal Government was unpleased with the course of social evolution in the Indian Territory and Congress worked in earnest to effect a lasting change in the way these citizens would be governed. The Congressional intent to disestablish all reservations in Oklahoma has carried forward to the present, and Congress has since recognized that no reservations survived past Statehood; S. Rep. No. 1232, 74th Cong. 1st Sess., July 29, 1935, states:

> In Oklahoma the several Indian reservations have been divided up, the Indians having first chance at the selection of allotments or farms. After the Indians were allotted lands of their selections, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.

Against this background, the Supreme Court stated in Oklahoma Tax Commission v. United States, 319 U.S. 598 (63 S.C. 1284, 87 L.E.1612 (1943):

> The many cases dealing generally with the problem of Indian tax exemptions provide no basis for the government's argument that Congress, in view of the existing legal framework, must have assumed that it would immunize the securities and cash from estate taxes by restricting their alienation. Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483, held that a state might not regulate the conduct of persons in Indian territory in the theory that the Indian tribes were separate political entities with all the rights of independent status - a condition which has not existed for many years in the State of Oklahoma.
>
> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in Worcester v. Georgia, supra; and, unlike the Indians involved in The Kansas Indians case, supra, they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions.

The Supreme Court cited Oklahoma Tax Commission with approval in McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973), where the Court held that Arizona could not tax the income of an Indian on the Navajo reservation in that state. The Court stated at 411 U.S. 167-168:

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited

> reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See e.g., Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962), Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943).

And again at 411 U.S. 171 of that opinion:

> As noted above, the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See e.g. Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943).

All of these opinions expressed in Supreme Court decisions, Congressional reports, and federal publications, coupled with the surrounding circumstances which prompted Congress to adopt the policy of allotment and assimilation of the several reservations in Indian Territory all point to the conclusion that the tract of land in question here, or any tract of land in Oklahoma, is not a reservation.

The Supreme Court held in Solem v. Bartlett, 465 U.S. 463, 104 S.C. 1161, 79 L.Ed.2d 443 (1984), that explicit language of cession and unconditional compensation are not prerequisites for a finding that a reservation has been disestablished. The Court also looks to surrounding circumstances, the tenor of legislative reports presented to Congress, and events that happened after the passage of the Act as well as Congress' own treatment of the affected area in the following years to decipher Congress' intentions. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, the Court acknowledges de facto, if not de jure, diminishment, Solem at 465 U.S. 471, citing Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) and DeCoteau v. District County Court, 420 U.S. 425 (1975). When the factors set out in these three cases are applied in the context of the case at bar, it is clear that reservations no longer exists in Oklahoma.

B. STATE TAX LAWS ARE NOT PRE-EMPTED BY FEDERAL LAW AND DO NOT INFRINGE THE TRIBE'S RIGHT TO GOVERN ITSELF.

1. STATE INCOME TAXES ARE NOT PRE-EMPTED AND DO NOT INFRINGE TRIBAL SELF-GOVERNMENT.

The Tribe argues that tribal members or nonmembers employed by the Tribe or who receive income from work performed on tribal trust land are exempt from state income taxes on that income. The principal authority for this position is McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.C. 1257, 36 L.Ed.2d 129 (1973). In McClanahan the Court ruled that a Navajo Indian who resided and earned all of her income within the Navajo Reservation in Arizona was not subject to state income taxation.

As the State has discussed above, no Indian reservations remain in Oklahoma, which precludes the Tribe's reliance on McClanahan since the legal existence of a reservation was the salient point of the Court's ruling. The reservation was created by Congress to allow the Navajo Tribe in that case to govern themselves. Application of State laws within the federal area would necessarily infringe tribal rights which Congress intended to protect and was therefore not permitted.

The Court recognized that Congress did not have this same intention for Tribes off of a reservation. The limitations of the McClanahan decision are more important than the ruling itself. At the outset of the case, the Court stated at 411 U.S. 167:

> It may be helpful to begin our discussion of the law applicable to this complex area with a brief statement of what this case does not involve. We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government. See, e.g., Organized Village of Kake v. Egan, supra; Metlakatla Indian Community v. Egan,

> 369 U.S. 45 (1962); Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943).

In Oklahoma Tax Commission v. United States, the Supreme Court found that the Court has repeatedly said that tax exemptions are not granted by implication. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, "if the exemption had been intended it would doubtless have been expressed," The Cherokee Tobacco, 11 Wall. 616, 20 L.Ed. 227 (1871). If Congress intends to prevent the State of Oklahoma from levying a general nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences.

The Court went on to say, it is true that our interpretation must be in accord with the generous and protective spirit which the United States properly feels toward its Indian wards, but we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian. The Court has held that the Indians, like all other citizens, must pay federal income taxes. Superintendent v. Commissioner, 295 U.S. 418, 55 S.Ct. 820, 79 L.E. 1517 (1935). Wardship with limited power over his property did not there without more, render the Indian immune from the common burden. The Supreme Court stated at 319 U.S. 608-610:

> Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.

Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children, schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a state, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the state. If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay. "Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?" The Cherokee Tobacco, supra, 11 Wall. page 621, 20 L.Ed. 227.

> Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism.

A month after the Supreme Court rendered its decision in Oklahoma Tax Commission v. United States, the Tenth Circuit Court of Appeals held in United States v. Hester, 137 F.2d 145 (1943), that:

> It is pertinent to remember that the sovereign State of Oklahoma has plenary power to tax all property within its domain, unless specifically restrained by force of Federal law. Indians residing in Oklahoma are citizens of that State, and they are amenable to its civil and criminal laws. Their property, unless exempt, is subject to taxation in the same manner as property belonging to other citizens of that State.

In the case of Choteau v. Burnet, 283 U.S. 691, 51 S.C. 598, 75 L.Ed. 1353 (1931), the Supreme Court ruled that an Osage Indian holding a certificate of competency was subject to federal income taxes on his royalty income from the Osage headright. The taxpayer in Choteau resisted the tax claiming an exemption because of his status as an Indian. The Court rejected the taxpayer's assertion and found that no provision in any of the treaties referred to has any bearing upon the question of the liability of an individual Indian to pay tax upon income derived by him from his own property. The course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property including the duty to pay taxes. The Court then held at 283 U.S. 695:

> There are provisions in the Act of 1906 with respect to the holding, payment, and administration of the royalty shares of members who do not have certificates of competency, but with these we are not concerned. The shares of royalty of those holding such certificates are to be paid to them quarterly.
>
> The petitioner, then, was competent to hold and make any use (except to grant mining leases) of all his lands. All except his homestead were taxable, and were

freely alienable without control or supervision of the government. His share of the royalties from oil and gas leases was payable to him, without restriction upon his use of the funds so paid. It is evident that, as respects his property other than his homestead, his status is not different from that of any citizen in the United States. In the process of gradually changing the relation between the Indian and the government he has been, with respect to the income in question, fully emancipated. Compare United States v. Waller, supra. It is true, as petitioner asserts, that as to his homestead he still remains a restricted Indian. But this fact is only significant as evidencing the contrast between his qualified power of disposition of that property and his untrammeled ownership of the income in controversy. The latter was clearly beyond the control of the United States. The duty to pay it into petitioner's hands, and his power to use it after it was so paid, were absolute.

The Choteau case is precisely on point with the case at bar in that the taxpayer claimed that he was not subject to income tax because of his status as an Indian and the fact that he received the income from his restricted allotment held in trust by the United States, where he lived (the Court notes that the land was his homestead). The Court found that he was taxable because of his untrammeled ownership of the income when he received it. In the case at bar, the tribal employees receive their wages and their power to use that income is absolute and unrestricted. The fact that they received income from work performed on tribal trust land does not impair their power over that money and the taxation of that income is not an infringement of tribal rights. Although Choteau dealt with federal taxes, the Supreme Court applied the same reasoning to reach the same result in a similar case with regard to State taxes in Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 56 S.C. 507, 80 L.Ed. 771 (1936). If the State and Federal income taxation of the individual Indians in Leahy and Choteau did not infringe the rights of the Osage Tribe, it cannot

be proposed by the Sac and Fox that taxation of wages paid to its employees infringes its rights.

The Leahy case holds that headright income of Osage Indians with a certificate of competency is subject to State income taxes. Obviously the Supreme Court has found that the State income taxation of an Osage Indian does not infringe on the Tribe's right to govern itself. The situation of the Oklahoma Indians is different than that of reservation Indians in other states, which point is made by the Supreme Court in the McClanahan case which closely tailors the ruling in McClanahan to the facts of that case. In fact Oklahoma Tax Commission v. United States, supra, and Leahy are cited with approval in McClanahan as examples of cases where Indians are properly subject to State taxes.

Therefore, the Supreme Court has clearly held that McClanahan does not apply to the situation of the Indians in Oklahoma. The case at bar is on point with Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.C. 1267, 36 L.E.2d 114 (1973) which relied on Oklahoma Tax Commission v. United States, and Leahy for its holding that tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities not on any reservation." Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. The Court ruled at 411 U.S. 156:

> Absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.

2. STATE MOTOR VEHICLE TAXES ARE NOT PRE-EMPTED BY FEDERAL LAW AND DO NOT INFRINGE TRIBAL RIGHTS.

The question of whether or not tribal members are subject to state motor vehicle taxes again hinges upon whether those motor vehicles are operated on an Indian reservation. Since no reservations exist in Oklahoma, the tribal members are subject to those state taxes.

Based on the authority in McClanahan, supra, the Supreme Court has held in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.C. 1634, 48 L.E.2d 96 (1976), at 425 U.S. 480-481, and Washington v. Confederated Tribes of Colville, 447 U.S. 134, 100 S.C. 2069, 65 L.E.2d 10 (1980) at 447 U.S. 163-164, that state motor vehicle taxes could not validly be applied to motor vehicles owned by tribal members who resided on the reservation. However, the Court was careful to point out in Colville that the State is free to levy a tax on the use outside the reservation of Indian-owned vehicles and had the State of Washington tailored its tax to the amount of actual off-reservation use for vehicles driven both on and off the reservation, the tax could have been upheld.

Since no reservations remain in Oklahoma, there is no need to allocate on and off the reservation driving mileage in order to tax these vehicles since all of the mileage is off-reservation and the only roads available in this state are constructed and maintained by a city or county government, or the State or Federal government. Further, the revenues generated by these taxes are appropriated to public schools, and cities and counties to build and maintain roads as well as the State's general fund which provides more facilities and benefits used and enjoyed by all citizens, including Indians in this State.

There are no tribally owned or constructed roads in this state and certainly there are no reservations. Therefore, the tribal motor vehicle tax is only a profiteering venture by the Tribe since none of the taxes are used to build or maintain public schools or roads. This is not to say that the Tribe cannot collect the tax from its members. The State readily concedes that the Tribe can levy such a tax. Although the Tribe may validly collect taxes from its members, there is no federal law which pre-empts the State taxes or authorizes the Tribe to pre-empt otherwise valid state taxes.

Since tribally owned or tribal member owned motor vehicles are operated outside of any reservation and within Oklahoma, the State taxes are validly imposed, see Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.C. 1267, 36 L.Ed.2d 114 (1973), at 148, "State authority over Indians is yet more extensive over activities not on any reservation."

The Tribe cannot pre-empt State taxes by enacting its own tax law because, "There is no conflict between the state and tribal schemes, since each government is free to impose its' taxes without ousting the other," Colville at 447 U.S. 158. An Indian tribe is free to make its own laws to govern its own members, but when that tribe or those members are operating outside of a reservation, they are responsible to State laws also, Mescalero, supra. Ward v. Race Horse, 163 U.S. 504, 16 S.C. 1076, 41 L.E.244 (1896). In this case, the tribal members are operating vehicles within the State of Oklahoma and therefore those members are subject to the concurrent jurisdiction of the Tribe and the State. Neither the Tribe nor the State can pre-empt or exclude the other's taxing authority with regard to those tribal members. Although two taxes may be burdensome, the burden is allowable as a consequence attributable to the fact that the tribal members are subject to two governmental entities which share jurisdiction, see Cotton Petroleum Corp. v. New Mexico, 490 U.S. ____, 109 S.C. 1698, 104 L.E.2d 209 (1989) at 1714.

The State takes the position that automobiles owned by the Tribe or its members are taxable regardless of whether tribal taxes are paid. But beyond that issue, the Tribe in this lawsuit complains that when a tribal member has elected not to pay State taxes on his or her automobile, but instead pays tribal taxes, that person then has difficulty reselling the car or trading it in because the person does not have a State title to their car. In order to obtain a title, the State requires payment of back taxes.

The Tribe brings this suit and asks the Federal Court to fix it for them. The Tribe wants this Court to require the State to issue car titles to owners on demand without payment of State taxes. The Federal Court may not be used to reform State laws or to bestow an exemption from tax upon an individual by decree of

Court. The Federal Court may not operate as a substitute for State legislatures. Therefore, this Court may not compel the State to issue a motor vehicle title to any individual who has not complied with the applicable State laws which require payment of certain nondiscriminatory taxes as a precedent for obtaining the required title and license. The State legislature has not exempted Indians or Indian tribes nor their subsequent transferees from the motor vehicle tax laws. This Court cannot replace the State law with its own judgment but, rather, must conform its judgment to State law. The procedure is very simple in this case; if an individual desires to obtain a car title issued by the State, that person must do all that the law requires of him to be entitled to it. This conclusion to this litigation is compelled by the Tenth Amendment to the Constitution.

The Supreme Court stated in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.C. 817, 82 L.E. 1188 (1938) that the Constitution of the United States recognizes and preserves the autonomy and independence of the states in their legislative and judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.

> The authority and only authority is the State, and if that be so, the voice adopted by the State as its own, whether it be of its Legislature or of its Supreme Court, should utter the last word.

The Oklahoma Vehicle Excise Tax Act is not a discriminatory law against Indian owned vehicles because it requires all persons alike to pay those taxes for vehicles in Oklahoma. Although an exemption applies to vehicles owned and titled in other states from the tax at 68 O.S. 2105(b), the vehicles in question here are operated in Oklahoma and are not titled by other states. This does not violate equal protection because the situation of a vehicle title

in another state is not equal to the situation of a vehicle titled by a tribe. Both are different and are treated differently. There are only fifty states at last count and not a single Indian tribe is listed among their number. The Ninth Circuit Court of Appeals has held in Chemehuevi Indian Tribe v. California, 800 F.2d 1446 [9th Cir. (1986)] at 1450 that an Indian tribe's sovereignty is not that of a state and therefore California need not treat the Chemehuevi Tribe as it treats other states. Since the Legislature of the State of Oklahoma has not seen fit to exempt persons who tribally title and tag the car from state taxes and laws, it is not up to this Court to create the exemption itself.

CONCLUSION

This case seemingly involves a conflict of laws between State and tribal income tax laws and motor vehicle tax laws, but actually there is no conflict at all, rather an unwillingness to pay. The unwillingness is of course grounded on the aspect of a taxpayer who is put in a position of paying two taxes. The multiple tax burden is not unconstitutional, however. There is no improper double taxation because the taxes are being imposed by two different and distinct taxing authorities. The Tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power.

For the reasons stated above, the State respectfully requests that this Court grant summary judgment in favor of the State and rule that the Sac and Fox Reservation has been disestablished and that State income taxes and motor vehicle taxes are applicable to both members and non-members of the tribe.

DATED this 6th day of February, 1991.

Respectfully submitted,

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CERTIFICATE OF MAILING Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

PLAINTIFF'S OBJECTION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Sac and Fox Nation, objects to Defendant's Motion for Summary Judgment, and moves for summary judgment in Plaintiff's favor pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is based on the ground that the pleadings, Preliminary Status Report, and the affidavits and exhibits attached to the Plaintiff's brief in support of this motion show that there is no substantial controversy as to any material fact and that Defendant may not enforce its income tax and motor vehicle taxes against the Sac and Fox tribal members, tribal employees and other Indians and non-tribal members who live or work within the Sac and Fox Reservation and other Sac and Fox Indian Country in Oklahoma.

G. William Rice
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(918) 225-4800

CERTIFICATE OF MAILING Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT AND
OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Sac and Fox Nation, objects to Defendant's Motion for Summary Judgment, and has moved for Summary Judgment in Plaintiff's favor pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff files this brief, with supporting affidavits and exhibits, in support of said motion and its objection to Defendant's motion for summary judgment.

PROPOSITION I

THE SAC AND FOX RESERVATION HAS NOT BEEN DISESTABLISHED.

Defendant states as an article of faith that the Sac and Fox Nation has no reservation in Oklahoma. Defendant argues that "cede" and convey" type language in allotment agreements act to destroy reservations. However, it should be noted that the language of the Sac and Fox Allotment Agreement, 26 Stat. 749 (1891), is substantially similar to earlier treaties in which the Sac and Fox ceded land to the United States, yet retained governmental rights and authority therein. Often the United States would accept

ceded land then allow the Sac and Fox a reserve out of the cessation of land to live upon, hunt, and otherwise control their affairs.

Defendant argues that the 1891 Allotment Agreement disestablishes the Sac and Fox Reservation, and Defendant's argument is based upon the language of said agreement which states that the Nation "hereby cedes, conveys, transfers, surrenders and forever relinquishes' all their title, claim, or interest in the land. Words such as "cede" and "relinquish" were used in many of the Sac and Fox treaties. However, these words provided no indication as to whether or not a Sac and Fox Reservation was disestablished, created, or moved to another location, and such language has been determined to be ambiguous by the Supreme Court of the United States. *DeCoteau v. District Court*, 420 U.S. 425 (1975).

In the *Treaty of November 3, 1804*, 7 Stat. 84, which was made at St. Louis, the Sac and Fox ceded land to the United States. The pertinent part of the 1804 treaty reads: "And said tribes...do hereby cede and relinquish forever to the United States, all the lands included within the above-described boundary." See Article 2 of the *Treaty of November 3, 1804*, 7 Stat. 84. Although the land was ceded the treaty provided in part:

> ART. 7. As long as the lands which are now ceded to the United States remain their property, the Indians belonging to the said tribes, shall enjoy the privilege of living and hunting upon them. (Emphasis added).

See Article 7, Treaty of 1804. The Sac and Fox were allowed to live upon the land they ceded and use it as they saw fit.

Other treaties likewise make it clear that the "cede" and "relinquish" language was not determinative. In the Treaty of July 15, 1830, the land was ceded, but said Treaty also provided:

> But it is understood that the lands ceded and relinquished by this Treaty, are to be assigned and allot-

> ted under the direction of the President...to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting, and other purposes.

See Article 1, *Treaty of July 15, 1830*, 7 Stat. 328. In the Treaty of Sept. 21, 1832, the Sac and Fox once again ceded land to the United States. However the Treaty provided in part:

> ARTICLE II. Out of the cession made in the preceding article, the United States agree to a reservation for the use of...tribes...

See Article 2, *Treaty of Sept. 21, 1832*, 7 Stat. 374. The Treaty of May 6, 1861, also contained "cede, relinquish, and convey" language. But said Treaty further provided:

> The reservation herein described shall be surveyed and set apart for the exclusive use and benefit of the Sacs and Foxes of Missouri, and the remainder of the Iowa lands shall be the tribal reserve of said Iowa Indians for their exclusive use and benefit.

Article 3, *Treaty of May 6, 1861*, 12 Stat. 1171. Thus some treaties would have the tribe cede land to the United States and the United States would then allow the same tribe and perhaps another tribe to have a reserve upon the land which was ceded.

Other treaties make it clear that a tribe, at least the Sac and Fox, retained rights and privileges in land which was ceded to the United States. The Treaty of October 21, 1837, states in part:

> ARTICLE 1st. The Missouri Sac and Fox Indians make the following cessions to the United States: ...
>
> Second. Of all the right to locate, for hunting or other purposes, on the land ceded in the first article of the treaty of July 15th, 1830, which, by the authority

> therein conferred on the President of the United States they may be permitted by him to enjoy. (Emphasis added).

Article 1, *Treaty of October 21, 1837*, 7 Stat. 543. This indicates that the Sac and Fox gave up rights to land ceded in 1830 by this treaty which was made in 1837. It is clear that a tribe could cede land and retain reservation. Thus the "cede" and "relinquish" language in the 1891 Allotment Agreement must be looked at in the same light as other treaties.

The "cede and relinquish" language meant little, if anything, to the Sac and Fox. Sometimes the Sac and Fox would live on land which was ceded and sometimes they would be moved. Thus the cession language, standing alone, is ambiguous at best. Since the Sac and Fox were not to be moved by the 1891 allotment agreement, there was no reason for the Sac and Fox to believe the reservation was destroyed.

Treaties or agreements said to affect reservation boundaries must be construed liberally in favor of the Tribe, *Choctaw Nation v. United States*, 318 U.S. 423 (1943); *Choate v. Trapp*, 224 U.S. 665 (1912); *Creek Nation v. Hodel*, 851 F.2d 1439 (D.C. 1988), and interpreted as the tribe would have understood them--a land transaction not a disestablishment of the reservation. *Choctaw Nation v. United States*, supra. Ambiguity must be decided in favor of the tribes.

The ambiguity in this Agreement must also be interpreted in favor of the Sac and Fox because of the one-sided nature of the Agreement. In *Sac and Fox Tribe v. United States*, 340 F.2d 368 (Ct.Cl. 1964), the Court found that:

> In 1889 and 1890 there was great political pressure on the Government to provide more land for white settlers. The result of this political pressure became apparent in the negotiations between the Jerome Commission and the Sac and Fox Tribes. Not only were the tribes told by the land commissioners that they must sell; they were admonished that they could

sell only to the United States, and only when the United States was ready to buy; that they could not even lease or mortgage the lands. Finally, they were told by the Commission in language of unmistakable import that $1.25 per acre was all they could get because that was all the Commission and the Congress would approve. They were even advised by one of the Commissioners that 'we have offered you more lands and made a better offer than the law provides for.' (Proceedings of the Jerome Commission, National Archives, Record Group 75, letters received 4738/1894, encl. 2.) The combined effect of all of these admonitions could only be interpreted as a flat ultimatum to the illiterate and unsophisticated representatives of the Sac and Fox that they had better take $1.25, 'or else,' in common parlance...

Even if we assume that the negative characterization of the conduct of the Government by the Indian Claims Commission, as above quoted, is correct, the fact remains that this sale was negotiated by Government coercion and compulsion exerted upon appellants to such a degree as to constitute duress.

Id. at 374. See, *The Cherokee Nation v. United States*, 9 Ind.Cl.Comm. 162, 234-35. This case then, is no *DeCoteau v. District Court* in which the tribal representative voluntarily agreed that the reservation should be terminated. Instead, it was a contract of adhesion which should be interpreted strictly against the government and in favor of the Sac and Fox. There is no doubt that Congress knew exactly how to abolish Indian reservation boundaries when it chose to do so. The reservation of the Sac and Fox has not been disestablished, and the power of a tribe to tax

---

See, *Act of April 21, 1904*, Ch. 1402, Sec. 8, 33 Stat. 189: "...That the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby abolished...."

within its reservation is without question.

Even if the Court should find that the original exterior boundaries of the Sac and Fox reservation were extinguished, it is clear that the reservation was simply diminished, not abolished. Certain tribal lands were expressly excepted from the operation of the Allotment Agreement (Article II). Further, it is clear that the Sac and Fox Tribes were never paid for the lands allotted to individuals, that the Tribe was required to buy back, out of the money payment it was to receive, any acreage needed for allotments in excess of 528 expected allotments (Article IV), that the allotted lands never became public lands of the United States (Article V). Such may be the stuff of a diminished reservation, but it certainly is not consistent with disestablishment.

PROPOSITION II

THE TERM INDIAN COUNTRY ENCOMPASSES MORE THAN RESERVATION LANDS.

Regardless of the status of the original reservation, clearly the remaining Indian trust allotments and tribally owned lands are Indian Country. 18 U.S.C. 1151. Defendant Tax Commission contends that if no reservation exists, the taxing power of said Commission penetrates into all of Indian Country. The Tax Commission attempts to distinguish "reservation" from all other types of Indian Country. No court has made a jurisdictional distinction between a trust allotment and a reservation. There simply is no magic in the term "reservation". In fact the courts of the State of Oklahoma recognize that the State has no civil jurisdiction in Indian Country. *Housing Authority of the Seminole Nation v. Harjo*, 790 P.2d 1098 (1990) (dependent Indian community).

Nor does Congress distinguish between "reservation" and other types of Indian Country. Title 18 U.S.C. 1151 mentions "reservation", "allotments", and "dependent Indian communities" in defining Indian Country. When Congress first sent the Sac and Fox into Oklahoma the area was not called "reservation", but

the area was called the "Indian country south of Kansas". *Treaty of February 18, 1867*, 15 Stat. 495, Article 6.

Plaintiff contends Indian Country was a term most often accepted as the term describing where the Indians were to live and govern affairs among themselves. Most modern day courts do not distinguish between a tribe's power to govern affairs in Indian Country as opposed to the Indian Country labeled as "reservation". See *Harjo*, supra.; *Indian Country, U.S.A. Inc. v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987). And courts in the past never made any attempt to draw subtle distinctions among the different types of Indian Country. *United States v. Sandoval*, 231 U.S. 29 (1913); *United States v. John*, 473 U.S. 634 (1978); *United States v. McGowan*, 302 U.S. 535 (1938); *DeCoteau*, supra.

Nor did the courts quibble over labels. In *United States v. Ramsey*, 271 U.S. 467 (1926), the Court forcibly asserted the continuing guardianship by the United States of the Indians in

> Oklahoma after statehood:
> But authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before, in virtue of the long-settled rule that such Indians are wards of the nation, in respect of whom there is devolved upon the federal government "the duty of protection and with [it] [sic] the power". The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the nation; and it rests with Congress alone to determine when that relationship shall cease. (Citations omitted).

Ramsey, at 46 S.Ct. 560.

The *Ramsey* Court went on to say:

> ...the difference between a trust allotment and a restricted allotment, so far as that difference may affect the status of the allotment as Indian country, was not regarded as important...it would be quite unreasonable to attribute to congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment, and we find nothing in the nature of the subject matter or in the words of the statute which would justify us in applying the term "Indian country" to one and not to the other.

Id. 46 S.Ct. at p. 560. Indian Country meant the area where Indians were placed upon to live. The particular label placed upon the type of Indian Country is irrelevant.

In conclusion, there is absolutely no logical reason to distinguish between a tribe's taxing powers upon "reservation" as opposed to other types of Indian Country. Any alleged disestablishment of the Sac and Fox reservation is unimportant since the various types of Indian Country are treated identically. The tax cases pertaining to "reservation" areas apply to the "reservation" or other types of Indian Country in the case at bar.

The Tax Commission's contention that *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257 (1953), is not applicable is without merit. Defendant Commission claims *McClanahan* does not apply because it deals with reservation. As explained, the types of Indian Country are not distinguishable. The deciding factor is whether or not the State of Oklahoma has jurisdiction over members of the Sac and Fox Nation in Indian Country.

PROPOSITION III

ANY STATE WITHOUT JURISDICTION IN INDIAN COUNTRY IS ALSO WITHOUT THE AUTHORITY TO TAX WITHIN SAID JURISDICTION.

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 178-179 (1973) the Court explained:

> ...a startling aspect of this case is that appellee appar-

> ently conceded that, in the absence of compliance with 25 U.S.C. 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians...But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected...Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial civil or criminal jurisdiction would seem to dispose of the case.

Indeed, conferring civil and criminal jurisdiction upon a state may still leave the state without taxing authority over Indians in Indian Country. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

There has never been any case which has held that a state may tax Indians within any part of Indian Country where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the states taxing power. Defendant contends that *United States v. Hester*, 137 F.2d 145 (1943), is a controlling case. In *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), the court stated:

> ...the State cites broad dicta in *United States v. Hester*...in support of its proposition that Oklahoma has "complete civil and criminal jurisdiction over all citizens residing within the state...the present case does not involve, nor does the Tribe challenge, Oklahoma's jurisdiction over its Indian citizens outside of **Indian country**. Moreover, *Hester* involved the authority of the state to tax a restricted Indian allotment pursuant to a specific act of Congress passed in 1928.
>
> Oklahoma's jurisdictional theory apparently dates back to the early days of statehood. At the time, state officials and non-Indians citizens attacked federal restrictions on the alienability of Indian property by

> arguing that once the Indians received United States and Oklahoma citizenship, the federal government lost its authority to treat them or their land differently...The State's 1953 position that Public Law 280 was unnecessary for Oklahoma and the broad conclusion suggested by its reading of *Hester* have been rejected by both federal and state courts. (Emphasis added).

Id. at p. 980, footnote 6. *Hester* does not seem to be adhered to.

Another case Defendant relies on is *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). The case is inapplicable for two reasons. First, *Oklahoma Tax Commission v. United States* involved the Five Civilized Tribes. The taxing power of the Five Civilized Tribes was abolished by the Act of April 26, 1906, 34 Stat. 141. The taxing powers of the Sac and Fox have never been abolished. Defendant admits the Sac and Fox may tax.

Second, *Oklahoma Tax Commission*, as well as other cases Defendant relies on, was decided before *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams v. Lee* the Court held that state law must fail if it interferes with tribal government. Imposition of state taxation upon Sac and Fox members hinders the Nation's tax collection efforts, and violates the governmental rights of the Sac and Fox Nation secured by the *Treaty of January 9, 1789*, 7 Stat. 28, and never yet superseded.

PROPOSITION IV

THE STATE, ASSUMING IT HAS JURISDICTION IN INDIAN COUNTRY, IS STILL WITHOUT THE AUTHORITY TO TAX BECAUSE OF INTERFERENCE WITH TRIBAL SELF-GOVERNMENT.

Williams v. Lee, 358 U.S. 217 (1950), announced that state laws may not infringe upon tribal self-government. The Tax Commission contends there is not interference with tribal government because Indians can use Oklahoma roads and schools.

Oklahoma's motor vehicle tax is in no way connected to the use of roads, and anyone may use Oklahoma roads.

Oklahoma schools do not teach the Sac and Fox language or history. Defendant is unwittingly engaged in forced assimilation. Defendant interferes with the tribal government's attempt to collect tax and provide services and justifies the action because the tribe cannot build schools. Defendant labels tribal taxation as "profiteering." Until tribal governments are allowed to collect tax without interference it will force Indians to rely on outside governments for services.

Requiring the Sac and Fox Nation to provide both civil and criminal protection within its jurisdiction while draining tax monies to sources outside that jurisdiction is unconscionable. A tribe's interest compared to others in raising revenue for essential government programs is stronger when the taxpayer is the recipient of tribal services. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980). The Tax Commission argues for the right to extract tax monies from the Sac and Fox jurisdiction while the burden of exercising civil and criminal jurisdiction is on the Tribe. This frustrates tribal self-government and therefore state taxation is not allowed. *Williams v. Lee*, supra.

PROPOSITION V

THE STATE'S COLLECTION OF MOTOR VEHICLE TAX VIOLATES THE INDIAN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION AND OTHER FEDERAL LAW.

Only the Congress may regulate commerce among Indians. U.S. Constitution, Article I, Section 8, Clause 3. States, when authorized by Congress, are allowed to tax non-Indians within the Indian Country, but states are not allowed to tax Indians, and because of the Sac and Fox treaties are not allowed to tax anyone in this action. Sac and Fox Treaties, 1789 - passim. But the tax in the case at bar is placed directly upon the members of the Sac and Fox Nation and other Indians.

The rules for state taxation in the Indian Country are exactly the opposite of the normal taxation rules. As the Court stated in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399, 2403 (1985):

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. (Citations omitted).

The cases prohibiting state taxation of Indians within Indian Country in the absence of unmistakable authorization from Congress are legion. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578 (1980); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 100 S.Ct. 2592 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069 (1980); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989); *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 516 N.Y.S. 2d 179, 508 N.E.2d 914 (1987); *LaRoque v. State*, 583 P.2d 1059 (Mont. 1978); *Valandra v. Viedt*, 259 N.W.2d 510 (S.D. 1977); *Eastern Navajo Industries, Inc. v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (N.Mex. 1976); *Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (N.Mex. 1975); *Waumeka v.*

Campbell, 22 Ariz.App. 287, 526 P.2d 1085 (Az.App. 1974); *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973); *Commissioner of Taxation v. Brun*, 286 Minn. 43, 174 N.W.2d 120 (Mn. 1970); *Pourier v. Board of County Comm'rs.*, 83 S.D. 235, 157 N.W.2d 532 (S.D. 1968); *Pierce v. State Tax Comm.*, 274 N.Y.S.2d 959 (N.Y. 1966); *Red Lake Band v. State*, 311 Minn. 241, 248 N.W.2d 722 (Mn. 1976); *State v. Whitebird*, 329 N.W.2d 218 (Wis. 1982); *Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1027 (Az. 1981); *Valandra v. Viedt*, 259 N.W.2d 510 (S.D. 1977).

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment must be denied, and Plaintiff's motion for summary judgment granted.

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Certificate of Mailing omitted.

The Order of the United States District Court for the Western District of Oklahoma which disposed of the cross-motions for summary judgment, entered on April 17, 1991, is printed in the petition for certiorari page A-9.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

OKLAHOMA TAX COMMISSION'S
MOTION FOR REHEARING

COMES NOW, the Oklahoma Tax Commission and moves the Court for rehearing and reconsideration pursuant to Rule 59 of the Federal Rules of Civil Procedure for the following reasons:

1. The Court did not resolve the issue raised and briefed by both parties of whether the former Sac and Fox Reservation, as established by 15 Stat. 495, still exists as it is described in the Cession Agreement at 26 Stat. 749.

2. The Court's ruling that the State be enjoined from imposing State income tax on income received by tribal members from tribal employment on trust land is in conflict with controlling Supreme Court precedents.

3. The Court's injunction of the State's enforcement of State motor vehicle taxes is overly broad and not supported by Supreme Court precedent.

DATED this 29th day of April, 1991.

Respectfully submitted,
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CERTIFICATE OF MAILING OMITTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,)
)
Plaintiff,)
)
v.) NO.CIV-90-1553A
)
OKLAHOMA TAX COMMISSION)
)
Defendant.)

BRIEF IN SUPPORT OF OKLAHOMA TAX COMMISSION'S MOTION FOR REHEARING

I. THE COURT'S ORDER DOES NOT RESOLVE THE ISSUE OF WHETHER THE SAC AND FOX RESERVATIONS EXIST.

The issue as raised in the Preliminary Status Report, filed herein on November 8, 1990 states, "Has the original Sac and Fox reservation been diminished or disestablished by federal law?" This issue was raised and extensively briefed in the cross motions for Summary Judgment filed by both parties to the brief. This issue is important with regard to the second issue of taxability and how Supreme Court precedents can be applied to the specific situation of this case.

It is not enough to say that the Supreme Court's decision in Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 111 S. Ct. 905 (1991) resolved this issue because the question posed in the instant case is whether the entire expanse of the former Sac and Fox Reservation is still Indian Country. The State can stipulate now, that any tract of land that is held in trust by the federal government for the benefit of an Indian Tribe is

Indian Country. Within this State, and, more particularly, within the area of the State at issue herein, there are hundreds of tracts of land of varying sizes, scattered randomly throughout and among areas of unquestioned State jurisdiction which are held in trust by the federal government and which constitute Indian country. But the former reservation does not exist as stated in briefs filed by the State on February 7, 1991, March 8, 1991 and April 3, 1991.

This distinction makes the application of McClanahan v. Arizona Tax Commission, 411 U.S. 164, 93 S.C. 1257, 36L. Ed.2d 129 (1973) and Washington v. Confederated Tribes of Colville, 447 U.S. 134, 100 S.C. 1069, 65 L.Ed.2d 10 (1980), much more difficult than it otherwise would have been. Therefore, in order to apply the decisions of McClanahan and Colville, the Court must decide whether the reservation exists.

II. INCOME TAXATION OF TRIBAL MEMBERS.

Without deciding whether the Sac and Fox reservation exists, the Court concluded that the Tribe's trust land is a reservation. This ruling is sustainable under the Potawatomi decision. The Court, based on this finding, holds that McClanahan is applicable and rules, "the Commission may not tax the income of Sac and Fox tribal members that is derived from tribal employment on trust land". However, that is not the ruling or the analysis given in McClanahan.

McClanahan involved a narrow question, 411 U.S. 168, involving whether Arizona could tax the income of 1. a Navajo tribal member, 2. who lived on the Navajo Reservation and 3. whose entire income was earned exclusively on the reservation. One must touch all three bases to hit the tax exemption home run. Now, to apply McClanahan to the case at bar it is necessary to determine the extent of the reservation because one of the McClanahan elements is residence on the reservation.

The only determination of reservation status in this case is that the tribal headquarters building is located on a reservation. Checking all of the factors, the residence requirement is not met. Therefore, only the tribal members who both live on Indian

Country and work on Indian Country are eligible.

To comply with the ruling in McClanahan, the Court's Order must determine who works within the Sac and Fox reservation, who lives within the reservation, and out of those people, which ones are tribal members, and the injunction would be properly granted as to that limited class.

However, the Commission questions the applicability of the McClanahan decision to Oklahoma in the first place, in light of the Supreme Court's rulings in Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed.1612 (1943), Leahy v. State Treasurer of Oklahoma, 297 U.S. 420, 56 S.C. 507, 80 L.Ed. 771 (1936), West v. Oklahoma Tax Commission, 334 U.S. 717, 68 S.C. 1223, 92 L.Ed. 1676 (1948) and United States v. Mason, 412 U.S. 391, 93 S.C. 2202, 37 L.E.2d 22 (1973), all cited and argued in previous briefs cited above.

III. MOTOR VEHICLE TAXES.

The Court next enjoined the Commission from enforcing its motor vehicle taxes by requiring the payment of license tags and excise taxes for prior years that a vehicle was properly tagged by the Tribe. The first complaint about this injunction is that it is much too broad in that the State is enjoined from collecting any motor vehicle taxes on any vehicle that is "properly tagged by the tribe." This ruling could be used by anyone to avoid State taxes whether or not they were a tribal member and whether or not the vehicle was used or "garaged" on a reservation. All that this ruling requires is that the vehicle be "properly tagged by the Tribe." This simple expedient could be accomplished by anyone regardless of whether they have met the Colville requirements and under this Order, the State would be required to grant transfer titles on request with no questions asked. Also, this ruling depends on the extent of the Sac and Fox reservation.

The Colville case dealt again with the specific situation of whether the State could tax vehicles owned by the Tribe or its members who resided on the reservation and who used the vehicles both on and off the reservation. This Court's ruling is not

so limited in that after an individual produces a tribal title, the State must give a State title to that person whether or not the person was a tribal member living on a reservation and using the vehicle both on and off the reservation.

The Colville case held that tribal members who lived on the reservation and operated vehicles both on and off of a reservation did not owe the State tax. The Colville case did not hold that any person who buys a tribal car tag is exempt from similar State motor vehicle taxes.

The Commission also disagrees with the Court's statement in footnote 4 on page 6 of the Court's Order that neither party raised the issue of whether the Commission can require tribally tagged vehicles to be tagged by the State. That issue is what this case is about and was raised and briefed by the State in the Commission's Brief in Support of Defendant's Motion for Summary Judgment filed on February 7, 1991, at pages 20-23.

In order to apply Colville, the Court must decide the extent of the tribal reservation. The State has always argued that since the Sac and Fox reservation does not exist, all roads where vehicles are used are necessarily off-reservation and tribal members are therefore taxable. The State concedes that hundreds of "reservation acreages" are scattered randomly throughout the State among areas of State jurisdiction. The situation of large contiguous areas within Indian reservations as in the Colville case, does not present itself in the case at bar.

Although the Order at page 5 cites as dicta, language in Colville which states that Washington may tax off reservation use of tribal members, the State disagrees that it is merely dicta. It is firmly established principle that regardless of tribal immunities and special rights of Indians within Indian country, State laws are fully applicable to Indians outside of Indian country. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.C. 1267, 36 L.Ed.2d 114 (1973); Ward v. Race Horse, 163 U.S. 504, 16 S.C. 1076, 41 L.E.244 (1896).

Therefore, the vehicles at issue in this case are fully taxable because there is no evidence or finding that the vehicles are used on a reservation. The Tax Commission enforces its tax laws in this

case by requiring any person who applies for an Oklahoma title and tag to pay all applicable taxes. In that regard, this Court may not infringe the State's rights to tax its non-Indian citizens.

CONCLUSION

For the reasons stated above, the Commission respectfully requests this Court to rehear the matter of the Commission's Motion for Summary Judgment in this case.

DATED this 29th day of April, 1991.

Respectfully submitted,

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CERTIFICATE OF MAILING Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

MOTION TO ALTER OR AMEND JUDGMENT

COMES NOW, the Plaintiff, Sac and Fox Nation, and pursuant to Federal Rule of Civil Procedure 59(e) moves this Court to alter or amend the judgment entered in this action on or about April 17, 1991 for the following reasons:

1. The Order finds that the state can impose its income tax upon nontribal members employed by the Sac and Fox.

2. The Order infers that the state can impose its car tag and excise tax upon non-tribal members' vehicles garaged upon the Sac and Fox Reservation.

3. The Order does not follow the case law distinction between on reservation activities that are "value added" and on reservation activities that merely "market an exemption", and does not give effect to the Sac and Fox Treaties which leave no room for State action.

WHEREFORE, Defendants pray this Honorable Court to alter or amend its Order dated April 17, 1991 and grant the full relief requested by the Plaintiff and deny in total Defendant's request for summary judgment.

Certificate of Mailing omitted.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,)
)
Plaintiff,)
)
v.) CIV-90-1553A A
)
OKLAHOMA TAX COMMISSION,)
Defendant.)

BRIEF IN SUPPORT OF
MOTION TO ALTER OR AMEND JUDGMENT

The parties to this litigation both filed motions for summary judgment in this action. On April 17, 1991, this Court entered an order partially granting each party's motion and partially denying each party's motion to the extent the other party's was granted.

The Plaintiff Sac and Fox Nation urges this Court to alter that order because it is more proper in the case of income tax and car tags to apply the law stated by the United States Supreme Court, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987) and of the 10th Circuit Court of Appeals, *Indian Country, USA v. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) than the cigarette tax cases. Those two cases together dictate that the request for summary judgment of the Sac and Fox be granted by distinguishing the Supreme Court's cigarette cases insofar as the cigarette cases grant the state the right to tax non-Indians so that those non-Indians cannot enter the Indian Country for the sole purpose of escaping state taxation, and immediately leave the Indian Country after purchasing a product in which the Indian tribe has added no value and attained no real interest.

The recent decision in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, ___ U.S. ___, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) did not expand the prior cigarette tax cases,

nor did it overrule the other tribal/state tax jurisdiction cases. The Supreme Court ruled the state tax on cigarette sales to non-members was validly imposed because the tribe was merely marketing a tax exemption. *See Washington v. Confederated Tribes of Colville*, 447 U.S. 158, 100 S.Ct. 2069 (1980). The Tenth Circuit underscored the difference between activities that market exemptions and that add value, or where the non-Indian or non-member spends extended periods of time in the Indian Country enjoying the services the Tribes provide:

> The Court in *Cabazon* rejected the argument that the Tribe was marketing an exemption from state gambling laws, and distinguished *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), as follows: "In [*Colville*, id at 155, 100 S.Ct. at 2082], we held that the State could tax cigarettes sold by tribal smokeshops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services, because the Tribes had no right 'to market an exemption from state taxation to persons who would normally do their business elsewhere.' We stated that '[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest.' Ibid. Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have strong incentive to provide comfortable, clean and attractive facilities and well-run games in order to increase attendance at the games...[T]he

> Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest." *Cabazon*, 107 S.Ct. at 1093-94.

Indian Country, USA, id at 982.

Further, Articles 7, 9, 13, 14 of the *Sac and Fox Treaty at Fort Harmar, 1789*, 7 Stat. 28, (found at tab 5 of Plaintiff's Exhibits in Support of Plaintiff's Motion for Summary Judgment along with the legislative history of said treaty), and the Treaty of August 19, 1825, 7 Stat. 272 effectively grant the Sac and Fox exclusive jurisdiction over all persons who "settle upon their lands" thus leaving no room for state taxation of the income of persons who earn that income by working within the tribal jurisdiction at jobs created within the tribal jurisdiction, or of the property of persons who are "settled upon their lands" by principally garaging the vehicles within the tribal jurisdiction.

CONCLUSION

WHEREFORE the Plaintiff respectfully requests that this Court reconsider its Order entered on April 17, 1991 denying in part the Plaintiff's motion for Summary Judgment and grant in total the Plaintiff's motion for Summary Judgment.

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Certificate of Mailing omitted.

The Order of the United States District Court for the Western District of Oklahoma which disposed of the Motion for Rehearing and Motion to Alter or Amend Judgment, entered on May 21, 1991, is printed in the petition for certiorari at page A-14.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
THE OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that the Oklahoma Tax Commission, Defendant above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final judgment entered in this action on the 21st day of May, 1991.

DATED June 14, 1991.

Respectfully submitted,

OKLAHOMA TAX COMMISSION
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Attorneys for Defendant

CERTIFICATE OF MAILING Omitted

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIV-90-1553 A
	)	
OKLAHOMA TAX COMMISSION,	)	
	)	
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that the Sac and Fox Nation, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order denying the Plaintiff's Motion to Reconsider entered in this action on May 21, 1991.

Attorney for Sac and Fox Nation
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CERTIFICATE OF MAILING Omitted

The Opinion of the United States Court of Appeals for the Tenth Circuit, entered on June 16, 1992, is printed in the petition for certiorari at page A-1.

No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION, *Petitioner,*

v.

SAC AND FOX NATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF ON THE MERITS BY PETITIONER

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Preliminary Matter

QUESTIONS PRESENTED

1. Whether Sac and Fox tribal members who are employed by the Sac and Fox Nation are subject to Oklahoma income taxes on their wages earned from tribal employment.

2. Whether Sac and Fox tribal members who register their motor vehicle with the Tribe and buy a tribal license tag, thus become exempt from:

   a. The payment of Oklahoma motor vehicle excise taxes imposed on the tribal members' purchase of the vehicle, or

   b. Registering and licensing their vehicles under State law for use upon State roads and highways, and paying State license and registration fees imposed by State law.

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No. 92-259

In The

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF ON THE MERITS BY PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 967 F.2d 1425, and is reprinted in the Petition for Cert. page A-1.

The Order of the United States District Court for the Western District of Oklahoma (Alley, D.J.) has not been reported. It is reprinted in the Petition for Cert., page A-9. The Order of the District Court on rehearing is not reported and is reprinted in the Petition for Cert., page A-14.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.

§1254(1). The opinion of the Court of Appeals for the Tenth Circuit was entered on June 16, 1992. No petition for rehearing was sought. The Petition for Writ of Certiorari was docketed in this Court on August 10, 1992. The Petition was granted on November 9, 1992.

STATEMENT OF THE CASE

This case involves the Oklahoma Tax Commission's enforcement of State tax laws against individual persons who are members of the Sac and Fox Nation. Specifically, the Commission is attempting to collect State income taxes from tribal members who are employed by the Tribe and work primarily on Indian country within Oklahoma. Also, the Commission seeks to collect motor vehicle excise taxes and license and registration fees imposed on vehicles owned by Sac and Fox tribal members and used upon the State's roads and highways.

The Sac and Fox Nation is a federally recognized Indian tribe located within the State of Oklahoma, which is organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §501 et seq. The offices of the tribal headquarters are located near Stroud, Oklahoma, on a quarter-section (160 acres) excepted from operation of the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749, and is held in trust by the United States Government for the benefit of the Tribe. Within the area of the former Sac and Fox Reservation in central Oklahoma, the United States also holds other tracts of land in trust for the Tribe or its members. These tracts vary in size from a few acres to 640 acres and are not contiguous but are randomly scattered throughout the area among land that is otherwise within the jurisdiction of State government. The tribal trust land constitutes Indian Country as that term is defined in 18 U.S.C. §1151, and is within the jurisdiction of the tribal government. The Tribe employs both tribal members and nonmembers at its headquarters who primarily perform their duties on Indian Country at the headquarters building but may perform some duties off of Indian Country. Some employees of the Tribe may live on Indian Country and some employees do not

live on Indian Country but no one resides at the tribal headquarters.

The Tribe imposes an income tax on both members and nonmembers who are employed by the Tribe. The Tribe also imposes taxes on motor vehicles owned by any person or entity which are principally garaged on Indian Country under the jurisdiction of the Sac and Fox Nation. The Oklahoma Tax Commission does not challenge the Tribe's right to impose these taxes, but claims that the tribal members and nonmembers are also obligated to pay State income and motor vehicle taxes pursuant to State law, regardless of whether or not tribal taxes have been paid by those individuals.

The State imposes an income tax on all residents and nonresidents who receive income in Oklahoma pursuant to the Oklahoma Income Tax Act, 68 O.S. 1991 §2351 et seq. All tribal employees, whether tribal members or nonmembers, or any person who receives income for employment or work performed on Indian Country or elsewhere within Oklahoma are subject to pay Oklahoma income taxes. The State does attempt to assess and collect the income tax from such persons if they fail to report their income and pay those taxes.

The State also imposes a motor vehicle excise tax on the transfer of ownership or use of a motor vehicle in this State pursuant to the Vehicle Excise Tax Act, 68 O.S. 1991 §2101 et seq., and the State imposes an annual registration fee on the owners of every vehicle operated upon, over, along or across any avenue of public access in this State pursuant to the Oklahoma Vehicle License and Registration Act, 47 O.S. 1991 §1101 et seq. The Commission enforces the motor vehicle tax when a person, who had purchased a tribal license for their vehicle, subsequently sold that vehicle. The subsequent owner of the vehicle is required to pay the delinquent back taxes on the vehicle for the years the vehicle was tribally licensed in order to obtain an Oklahoma title and license plate for the car. The Commission will not issue a title on the basis of the previous owner's tribal title because the Commission contends that the State taxes are properly due and owing for that period. See Stipulation of Facts in Preliminary

Status Report, JA 16 and Statement of Material Facts as to which there is no substantial controversy, JA 28.

Because the Commission had assessed tribal employees for income taxes on wages from tribal employment and had required that delinquent motor vehicle taxes be paid for the period a vehicle was tribally licensed when the vehicle was sold, the Tribe brought an action against the Commission in the United States District Court for the Western District of Oklahoma to enjoin the Commission from enforcing the State income and motor vehicle taxes against its tribal members and others. The jurisdiction of the District Court was invoked under 28 U.S.C. §1362 because the Respondent is a federally recognized Indian tribe.

The District Court entered its Order on April 17, 1991, disposing of the litigants cross-motions for summary judgment. This Order is reprinted in the Petition for Cert., page A-9. The District Court found that the State should be enjoined from enforcing income taxes against wages earned by tribal members from tribal employment but that nonmembers employed by the Tribe were subject to State income tax.

The Court also enjoined the State from enforcing its motor vehicle taxes against a tribal member who properly licensed the vehicle with the Tribe by requiring the payment of the delinquent back taxes when the vehicle was sold. However, the injunction only extended to tribal members who own vehicles that are primarily garaged on trust land and licensed by the tribe of which they are members. Nonmembers of the tribe were required to pay all applicable State motor vehicle taxes. The District Court denied the motions for rehearing filed by each party, see Order at page A-14, in the Petition for Cert.

Both parties appealed this decision to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit's opinion, reprinted at page A-1 pet. cert., affirmed the decision of the District Court. Both the Tenth Circuit and the District Court declined to reach the issue of the extent of the Sac and Fox Reservation or whether the Reservation had been disestablished and refused to enter the required individualized treatment of particular treaties and specific federal statutes as they affect the

respective rights of States, Indians, and the Federal Government, ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 (1973). Instead, the lower courts concluded that under the authority of ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973), tribal members in any circumstances employed by the Tribe are not subject to State income taxes and pursuant to this Court's opinion in ***Washington v. Confederated Tribes of Colville***, 447 U.S. 134 (1980), those tribal members were not responsible for State motor vehicle taxes either.

SUMMARY OF THE ARGUMENT

This case involves whether the State of Oklahoma can collect income taxes from Sac and Fox tribal members who earn wages from employment by the Sac and Fox Nation. Also, the case concerns whether the state may require tribal members to pay vehicle excise taxes and registration fees on automobiles owned by the tribal member which are properly registered and licensed with the Tribe.

The Commission first argues that the extent or existence of the Sac and Fox Reservation is a relevant issue in this case because the geographical component to tribal sovereignty is an important factor to weigh in determining state authority. ***White Mountain Apache Tribe v. Bracker***, 448 U.S. 136 (1980). The Commission contends that the Sac and Fox Reservation was terminated pursuant to the ***Sac and Fox Allotment Agreement of February 13, 1891***, 26 Stat. 749, and the extent of Indian Country remaining in Oklahoma consists of plots of trust land of various sizes scattered among land which is otherwise within state jurisdiction. The intent and result of this Agreement was the termination of the Sac and Fox Reservation. ***DeCoteau v. District County Court***, 420 U.S. 425 (1975).

The Commission then discusses whether, within these circumstances, the income tax as applied to tribal members is either pre-empted by federal statute or impermissibly infringes tribal self-government. The Commission contends that the relevant federal statute did not provide for the pre-emption of state laws

because the Allotment Agreement was intended to assimilate the Indians into the general community of the state rather than leave the internal affairs of the Indians exclusively within the jurisdiction of the tribal government, ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973). Therefore, the Sac and Fox Nation lost its independent autonomy under the assimilation policy of the Agreement such that tribal self-government is not infringed by the duty of tribal members to pay state taxes in this context, ***Oklahoma Tax Commission v. United States***, 319 U.S. 598 (1943).

Next, the Commission contends that tribal members are not immune from payment of vehicle excise tax on the transfer of a motor vehicle, first because no federal statute exists to pre-empt the law and tribal government is not infringed, and second because the transaction of purchasing a motor vehicle occurs off of Indian Country which leaves the case clearly within state jurisdiction, ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 (1973).

Finally, the Commission asserts that tribal members are subject to pay annual vehicle registration fees on vehicles they own in Oklahoma for the reason that the state law is not barred by pre-emption or infringement and the state has a greater interest in the revenues than the Tribe since the tax is directed at off-reservation value and the taxpayer is the recipient of state services because all roads in Oklahoma are constructed and maintained by the state and the Tribe provides none of these services, ***Washington v. Confederated Tribes of Colville***, 447 U.S. 134 (1980).

ARGUMENT

I. TRIBAL MEMBERS OF THE SAC AND FOX NATION ARE SUBJECT TO OKLAHOMA INCOME TAXES ON WAGES EARNED FROM TRIBAL EMPLOYMENT.

A. THE SAC AND FOX RESERVATION WITHIN THE FORMER INDIAN TERRITORY HAS BEEN DISESTABLISHED.

This Court has ruled in ***White Mountain Apache Tribe v. Bracker***, 448 U.S. 136 (1980), at 142 that Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, §8 cl. 3. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law, e.g. ***Warren Trading Post Co. v. Arizona Tax Commission***, 380 U.S. 685 (1965). Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them, "***Williams v. Lee***, 358 U.S. 217 (1959).

The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply ingrained in our jurisprudence that they have provided an important backdrop against which vague or ambiguous federal enactments must always be measured, ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973).

In the present case, the Oklahoma Tax Commission (Com-

mission hereafter) contends that enforcement of Oklahoma income and motor vehicle taxes against Sac and Fox tribal members is not precluded by either barrier. In order to reach this conclusion, the Commission has argued that the Sac and Fox Reservation has been disestablished by the Sac and Fox Allotment Agreement, Act of February 13, 1891, 26 Stat. 749. The Commission raised this issue in both of the lower courts, see Preliminary Status Report, JA 17.

However, both of the lower courts refused to address this issue, see District Court Orders Pet. Cert. A-11, A-15 and Tenth Circuit opinion, footnote 2, Pet. Cert. A-4. The lower courts found that the existence of the reservation was irrelevant in terms of determining whether or not the application of State laws in this case is barred because trust land, validly set apart for Indian use under government supervision, qualifies as a reservation for tribal immunity purposes pursuant to ***Oklahoma Tax Commission v. Citizen Band Potawatomi***, _____ U.S. _____, 111 S.C. 905 (1991). From this, the Tenth Circuit reasoned in footnote 2 of its opinion, Pet. Cert. A-4, that "The focus in this type of case is tribal immunity from state jurisdiction." The Appeals Court found that the State cites no authority for its proposition that the size and physical distribution of Indian country should control the degree of tribal immunity asserted on those lands. Therefore, using the ***McClanahan*** case as its authority, the Appeals Court ruled in Section II A of its opinion that the State income tax is barred because "The State asserts no congressional authority for imposing the state taxes at issue."

The Commission suggests that the Tenth Circuit opinion in Section II A (Pert. Cert. A-4) is mistaken in several particulars. First, the ***Potawatomi*** case involved the Commission's attempt to tax a tribe on transactions within Indian Country between the tribe and its members by way of directly assessing or suing the Tribe. The sovereign immunity of the tribe itself prevented the Commission from using those methods, however, the Court did rule that nonmember transactions on Indian Country were properly taxable and other methods of enforcement were available to collect those taxes. In the present case, the tax enforcement is aimed at

individual tribal members as opposed to the Tribe. The Tribe is not being required to do or yield anything.

Second, the focus of this inquiry is not tribal immunity. The focus is whether the State action is prohibited in this case either because it is pre-empted by federal law or it infringes the right of reservation Indians to make their own laws and be ruled by them. The Appeals Court cited the language in ***McClanahan*** which stated, "by imposing the [income] tax...the State has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves." But the Appeals Court never cited the federal statute or treaty pertaining to the Sac and Fox which provides this result. The Tenth Circuit decision is contrary to ***Bracker*** which stated at 448 U.S. 145:

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Instead of entering any inquiry at all, the Tenth Circuit found that the Commission's action violated the essence of the ***McClanahan*** decision. Therefore, the Appeals Court applied the "McClanahan presumption" to rule that the Commission had exceeded its authority to tax the income of Sac and Fox tribal members since there is no congressional authority for imposing the state taxes at issue. Evidently, the Tenth Circuit Order has taken unwarranted liberty in presuming that any State of the Union has ever requested or received congressional authorization to impose any tax on its citizens and has also presumed that the mere citation of the ***McClanahan*** case disposes of the issue.

Finally, the issue of the extent or existence of the Sac and Fox reservation is a relevant issue in this case. Merely because a tribal member has some connection to Indian Country does not mean

that he or she may avoid paying nondiscriminatory taxes by tagging the base on Indian Country every once in a while. In ***Bracker*** at 448 U.S. 151, this Court stated:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry, though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Therefore, the Commission submits that this inquiry must begin with an investigation of the extent of the reservation to determine what manner of creature we are dealing with. It would be appropriate to briefly review the history of the Sac and Fox at this time.

According to ***A Guide to the Indian Tribes of Oklahoma***, Muriel H. Wright, C.1951 University of Oklahoma Press, the Sac and Fox are indigenous to the Great Lakes region of the United States. The Tribe later migrated South and settled along the Mississippi and Missouri Rivers in the States of Illinois, Iowa and Missouri where they remained until the middle of the nineteenth century. Then, by a series of treaties, the Sac and Fox ceded all their rights to lands in other states for two reservations in Kansas. When the lands in the Kansas reservation were gradually sold to encroaching white settlers, the Tribe negotiated the ***Treaty with the Sac and Foxes of February 18, 1867***, 15 Stat. 495 whereby a reservation was granted to the Tribe in Indian Territory in exchange for the cession of the Kansas reservations, and the Tribe was removed from Kansas. The United States also agreed to pay a dollar an acre for the ceded lands plus all outstanding indebtedness of the then financially-strapped Tribe.

In the years immediately following our Civil War, approximately 65 tribes were removed to Indian Territory in this manner and most of the Territory became occupied with contiguous Indian reservations from border to border. However, by the year

1887, Congressional policy changed with the enactment of the ***Daws Severalty Act***, 24 Stat. 388, which provided for allotments of the Indian reservations with the remaining unallotted lands on those reservations to be purchased by the government and thrown open to homesteading. By this time, the reservation system was deemed a failure in Indian Territory and the Congressional policy at that time intended to disestablish and individualize all of the reservations in Indian Territory with a view to the ultimate creation of the State of Oklahoma. This process is described in detail in the case of ***Woodward v. DeGraffenried***, 238 U.S. 284 (1915), which explains the vast problems experienced with the reservation system in Indian Territory and the efforts of Congress to dispose of that system in order to solve those problems.

The process was basically divided into two parts. First, the ***Oklahoma Organic Act of May 2, 1890***, 26 Stat. 81, created Oklahoma Territory, complete with a territorial government, which was established in the Western one-half of what is now the State of Oklahoma and included the Sac and Fox Reservation along with several other small tribes. The Eastern one-half of the State remained Indian Territory, which did not have an organized territorial government and which was occupied by the Five Civilized Tribes. The Jerome Commission was then created to negotiate cession agreements with the tribes in Oklahoma Territory and the Dawes Commission was appointed to negotiate with the Five Civilized Tribes in order to join the two territories into the State of Oklahoma.

The Jerome Commission negotiated the ***Sac and Fox Allotment Agreement of February 13, 1891***, 26 Stat. 749. In this Act the Sac and Fox Nation "hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to the following described tract of land...". The Act provided that the quarter section (160 acres) of land where the Sac and Fox Agency is located would remain the property of the Tribe as well as the section (640 acres) of land designated for a school and farm. The Act also provided that each member could select a quarter-section for an allotment and in consideration for the cession of land, the

United States agreed to pay $485,000.00 to the Tribe. The surplus land was then opened for homesteading on September 22, 1891, by the ***Presidential Proclamation of September 18, 1891***, 27 Stat. 989.

The case of ***DeCoteau v. District County Court***, 420 U.S. 425 (1975) construes a cession agreement with terms very similar to the Sac and Fox Agreement, see note 22 at 420 U.S. 439 for comparable terms in several other agreements. The ***DeCoteau*** case involved the Sisseton-Wahpeton Agreement which was contemporaneous with the Sac and Fox Agreement and was managed similarly by the Federal Government. Under similar circumstances this Court ruled that the face of the Act, its surrounding circumstances and legislative history all point unmistakably to the conclusion that the reservation was terminated, at 420 U.S. 444-445. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments, 420 U.S. 446. The Court concluded that the surrounding circumstances are fully consistent with an intent to terminate the reservation, and inconsistent with any other purpose, 420 U.S. 448. The Court recognized our current problem in Note 3 at 420 U.S. 429 that isolated tracts of Indian Country may be scattered checkerboard fashion over a territory otherwise under state jurisdiction which will lead to legal conflicts regarding conduct of persons having mobility over the checkerboard territory.

The Sac and Fox Allotment Agreement demonstrates that the reservation was disestablished and therefore, the extent of Indian Country in Oklahoma consists of scattered plots of trust land. This presents the task of sorting out the conflict in terms of whether State laws are barred in this case by one of the barriers mentioned in the ***Bracker*** case, namely pre-emption or infringement.

B. THE STATE INCOME TAX DOES NOT INFRINGE TRIBAL SELF-GOVERNMENT, NOR IS IT PRE-EMPTED BY THE RELEVANT FEDERAL STATUTE.

Although the two barriers of infringement and pre-emption are independent, they are so related that the existence of one barrier is inevitably tied to the existence of the other barrier, as the case of ***Williams v. Lee***, 358 U.S. 217 (1959), demonstrates.

In ***Williams***, the Court held that a non-Indian could not sue a Navajo tribal member in state court for collection of a debt which arose from sales of goods on the reservation, but must instead sue the tribal member in the Navajo tribal court system. This decision was based on the Court's early case of ***Worcester v. Georgia***, 6 Pet. 515 (1832), which held that the laws of a state can have no force within an Indian reservation. However, the Court described the ***Worcester*** principles as somewhat broad and stated at 358 U.S. 219, that over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of ***Worcester*** has remained. The Court then held:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

The Court concluded at 358 U.S. 223 that to allow the exercise of state jurisdiction would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. But the Indians only had a right to self-government by virtue of the ***Treaty with the Navajos***, June 1, 1868, 15 Stat. 667. This treaty provided that, in return for the Navajos' promises to keep peace, a reservation was "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States personnel, was to enter the reserved area. The Court found that implicit in these treaty terms was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.

Therefore, the Court found that tribal self-government was

infringed based on specific treaty terms which established that right. In the case at bar, the Tenth Circuit did not look to the relevant statute for guidance but merely concluded that the State law was pre-empted only because the Sac and Fox Nation was a federally recognized Indian tribe, see Tenth Circuit opinion at Pet. Cert. A-4. However, that status alone does not pre-empt state laws. The pre-emption must be provided in a federal statute.

But the ***Williams*** case explains that pre-emption of state laws is not provided for the Oklahoma Indians. At 358 U.S. 220-221, the Court found that Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any state ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them. Significantly, when Congress has wished the states to exercise this power, it has expressly granted them the jurisdiction which ***Worcester v. State of Georgia*** had denied. The Court cites instances in which states have been granted such jurisdiction in footnote 6, 358 U.S. 221, which states that the series of statutes granting extensive jurisdiction over Oklahoma Indians to state courts are discussed in the treatise entitled ***Federal Indian Law***, 1972 ed. complied by the United States Solicitor for the United States Department of Interior, at pages 985-1051. This treatise discusses the history of Indian Territory and the creation of the State of Oklahoma as well as the enactment of special laws for Oklahoma Indians. See also, ***Felix S. Cohen's Handbook of Federal Indian Law***, 1982 ed., for a similar discussion at pages 770-797.

The ***Williams*** case suggests that the federal government has not granted exclusive jurisdiction over tribal members to the Oklahoma tribes and has therefore modified the ***Worcester*** principles to accommodate state jurisdiction over Indians despite the fact that Indian Country and tribal governments do exist in Oklahoma. But their existence is not the question, nor the determining factor, rather, the question is, has the federal government pre-empted state law. In Oklahoma, the state government has assumed the burden that ***Williams*** requires in order to exercise

state jurisdiction, see ***Oklahoma Tax Commission v. United Sta*** 319 U.S. 598 (1943) at 608-610, and Congress has not denied s jurisdiction through legislation. In the ultimate sentence of the ***Willia*** case, the Court stated:

> If this power is to be taken away from them, it is for Congress to do it. ***Lone Wolf v. Hitchcock***, 187 U.S. 553 (1903).

Lone Wolf concerned a lawsuit brought by the Kiov Comanche and Apache (KCA) Tribes in Oklahoma which alleg that Congressional Acts which allotted the KCA reservation severalty and opened the ceded lands to white settlement, violat the property rights of the KCA and deprived the KCA of the lands without due process of law, contrary to the Constitutio The Court ruled that plenary power over tribal relations has be exercised by Congress from the beginning, and the power h always been deemed a political one, not subject to be controlle by the judicial department of government. The power exists abrogate the provisions of an Indian treaty unilaterally if such contingency should arise in the consideration of governmenta policy. ***Lone Wolf*** is an example of Congressional abrogation exclusive tribal authority or self-government. The case at bar i similar to ***Lone Wolf*** because the Sac and Fox were treated uni formly with the KCA tribes in terms of the cession agreement that were entered in the years preceding Statehood.

Therefore, Oklahoma's income tax law as enforced agains individual tribal members does not infringe tribal self-government nor is it pre-empted by federal law because the ***Sac and Fox Allotment Agreement*** does not preclude the extension of state law or imply that the tribal members remained exclusively within the jurisdiction of the tribal government in contrast to the Navajo treaty in the ***Williams*** case. As this Court has ruled in ***County of Yakima v. Yakima Indian Nation***, ___ U.S. ___, 112 S.C. 683 (1992), the objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries and force the assimilation of Indians into the society at large. Nowhere else was the United States more successful in accomplishing these

objectives than in Oklahoma. Certainly, the allotment agreement does not pre-empt state law and the taxation of the income of a tribal member does not infringe tribal self-government because the Tribe is not required to do anything. The fact that an individual pays state income tax does not lessen his duty to pay tribal taxes nor does it prevent the Tribe from operating its government within the jurisdiction which Congress has specified for it. Also, the Oklahoma taxes will be the sole responsibility of the individual tribal member, not the Tribe. The Tribe cannot be required even to withhold state taxes on the wages it pays to employees. ***Oklahoma Tax Commission v. Citizen Band Potawatomi***, ___ U.S. ___, 111 S.C. 905 (1991).

The state can collect these taxes from individual tribal members who earn wages from tribal or nontribal employment because this Court has previously ruled that such taxation is valid since the ***Worcester*** principles were modified in regard to Oklahoma Indians. The first such case is ***Leahy v. State Treasurer of Oklahoma***, 297 U.S. 420 (1936), which involved the state's taxation of a member of the Osage Tribe on income he received from the restricted mineral resources of the Tribe. The Court ruled that the state could tax this income pursuant to ***Choteau v. Burnet***, 283 U.S. 691 (1931). ***Choteau*** concerned whether an Osage tribal member was required to pay federal income tax on his earnings from the Tribe's mineral interest. The Court found that the tribal member's share of the royalties from oil and gas leases was payable to him without restriction upon his use of the funds so paid. Even though his homestead was restricted from alienation and was Indian Country, that fact was only significant as evidencing the contrast between his qualified power of disposition of that property and his untrammeled ownership of the income in controversy. His income was clearly beyond the control of the United States. The duty to pay it into his hands, and his power to use it after it was so paid were absolute. Therefore, the income was taxable both by the federal and state governments even though the Indian resided on Indian Country and received income from tribal sources, such as in the case at bar.

Next, the Court ruled that the state had authority to recover

inheritance taxes imposed on the transfer of the estates of three deceased members of the Five Civilized Tribes except for the homestead which was held in trust and was tax exempt as Indian Country in ***Oklahoma Tax Commission v. United States***, 319 U.S. 598 (1943). In that case, the Court distinguished the holding in ***Worcester v. Georgia*** at 319 U.S. 602 because the theory that Indian tribes were separate political entities with all the rights of independent status is a condition which has not existed for many years in the State of Oklahoma. The Court found that the underlying principles on which the reservation decisions are based do not fit the situation of the Oklahoma Indians. "Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in ***Worcester v. Georgia***, supra; and, unlike the Indians involved in ***The Kansas Indians*** [5 Wall. 737] case, they are actually citizens of the state with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions."

In contrast to the findings in the ***Williams*** case, the Court found at 319 U.S. 608-609 that Oklahoma has assumed the burdens of jurisdiction over the Indians in this state, which Indians are educationally and economically sophisticated enough to accept this status without disadvantage. Recognizing that equality of privilege and equality of obligation should be inseparable associates, the Court found that it is not unreasonable that the duty to pay taxes, which are based solely on ability to pay, should rest on these Indians.

The Tenth Circuit refused to consider or discuss these applicable opinions apparently under the misconception that the Commission was attempting to argue that the holding in ***McClanahan v. Arizona State Tax Commission***, 411 U.S. 164 (1973) was not controlling because tribal governments do not exist in Oklahoma. This was not the Commission's position. Certainly the Sac and Fox Nation is complemented with a valid government. This Court recognized tribal government exists in Oklahoma but explained in ***Oklahoma Tax Commission v. United States*** that these tribes have no effective tribal autonomy apart from state government in contrast to the situation found in the ***Worcester*** case. Therefore,

the ***Worcester*** principles are modified in such a situation to accommodate state jurisdiction, ***Williams***.

The ***McClanahan*** case therefore, does not stand as a convenient trump card played against state law to allow Indians an avenue to avoid income taxes as the Tenth Circuit suggests. On the contrary, the ***McClanahan*** case cites ***Oklahoma Tax Commission v. United States*** as an example of a situation where Indians within Indian Country who earn income from tribal sources are properly taxable by the state. At 411 U.S. 171, the Court stated, "...the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. See, e.g., ***Oklahoma Tax Commission v. United States***..." Although the Sac and Fox Nation does maintain jurisdiction over scattered tracts of Indian Country in Oklahoma, this situation is not equivalent to the Navajo Reservation. The Court distinguished the two situations at the outset in ***McClanahan*** at 411 U.S. 167 where the Court stated, "We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government."

The Tenth Circuit opinion would not consider the difference between the Sac and Fox quarter section and the 7.6 million acre Navajo Reservation, but reasoned that if a parcel of Indian Country exists, no matter how small, then ***McClanahan*** applies of its own force to pre-empt state law. This reasoning does not follow because the sine qua non of the pre-emption or infringement inquiry is a federal statute. The Supreme Court opinion does not pre-empt state law, only an Act of Congress can do so. Therefore, this Court began its analysis in ***McClanahan*** with the relevant treaty because the modern cases tend to avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power. The Indian sovereignty doctrine does not provide a solution but only a backdrop against which federal statutes must be read.

After reviewing the circumstances of the Navajo treaty in ***McClanahan***, the Court found that the treaty reserved certain

lands for the exclusive use of the Navajo under general federal supervision which precluded the extension of state law to the Navajos on the Reservation. The case at bar is not confronted with such circumstances. The Sac and Fox Allotment Agreement was intended to open the reservation of the Sac and Fox to any and all immigrants of whatever creed to go forth and possess the land. At all times contemporaneous with and subsequent to the Agreement, it was the intent of Congress to dispose of the reservations in favor of creating a State for the Union. It was furthermore always contemplated that state laws would extend to all persons residing in the former reservations as a matter of course. Therefore, the Indian tribes in Oklahoma were assimilated into the general society by this process and lost the exclusive autonomy enjoyed by tribes which inhabit federal reservations. Under these circumstances, the federal statute does not pre-empt the state income tax and the tax does not burden the geniune operation of tribal government as it currently exists in Oklahoma.

II. SAC AND FOX TRIBAL MEMBERS ARE NOT EXEMPT FROM STATE MOTOR VEHICLE EXCISE TAXES, LICENSE AND REGISTRATION FEES WHEN THE MEMBERS TRIBALLY LICENSE THEIR VEHICLES.

The Tenth Circuit ruled in Part III-A of its opinion, Pet. Cert. A-7, that a state may not require a tribal member residing on tribal lands to pay state motor vehicle taxes pursuant to the Appeals Court's interpretation of this Court's rulings in ***Moe v. Confederated Salish and Kootenai Tribes***, 425 U.S. 463 (1976), and ***Washington v. Confederated Tribes of Colville***, 447 U.S. 134 (1980). Apparently the Tenth Circuit thought these cases were applicable to the case at bar because the cited cases concerned whether the state could tax motor vehicles owned by reservation Indians and used both on and off the reservation. Other than stating that the cases are dispositive, the lower Court does not indicate how or why these cases are controlling authority for its opinion in the present case. The Commission contends that ***Moe***

and ***Colville*** do not provide such authority.

The circumstances in this case are that both the state and the Tribe have imposed motor vehicle taxes. The Tribe purports to tax all vehicles owned by residents of its "jurisdiction". This case does not involve the tribal tax and the state does not contend that the Tribe may not levy this tax. However, the state does assert that the tribal tax does not oust the state's tax on those same vehicles used in this state.

Oklahoma levies two different taxes on motor vehicles. The first tax is the Vehicle Excise Tax found at title 68 O.S. 1991 §2101 et seq. Pursuant to Section 2103 of this Act, an excise tax of 3 1/4% of the value of each vehicle is levied upon the transfer of legal ownership of any vehicle registered in this state. Next, an annual registration fee is imposed under the Oklahoma Vehicle License and Registration Act, title 47 O.S. 1991 §1101 et seq. Pursuant to Section 1132 of this Act, Subsection A sets out the following fees: (1) a registration fee of $15.00 per year for the use of the avenues of public access within this state, and (2) an annual fee in lieu of all other taxes of 1 1/4% of the factory delivered price for the first year and in each subsequent year the fee will be 90% of the previous year's fee.

The Tenth Circuit ruled that the state's motor vehicle taxes were property taxes and are therefore prohibited under ***Moe*** and ***Colville***. However, the Supreme Court of the State of Oklahoma has ruled in ***Application of Baptist General Convention of Oklahoma***, 195 Okl. 258, 156 P.2d 1018 (1945) that these motor vehicle taxes are excise taxes, and not property taxes, because the Oklahoma Constitution, Art X, Section 6, exempts churches from property taxes, and by ruling that the tax was an excise tax, the Oklahoma Supreme Court held that churches were not exempt from those taxes. However, this is a minor mistake because the ***Colville*** opinion indicates at 447 U.S. 163 that the tax will not escape the prohibition merely by denominating the tax as an excise tax rather than a property tax.

The real problem is whether the state taxes are pre-empted by federal law or infringe tribal self-government. The Commission insists that the Tenth Circuit did not resolve this issue in its Order.

A. VEHICLE EXCISE TAXES.

The Vehicle Excise Tax is imposed upon the transfer of legal ownership of a vehicle registered in Oklahoma. The tax is not paid annually but is paid by the purchaser of a vehicle in order to obtain a certificate of title. Therefore, the tax is only paid when a vehicle is sold and the new owner applies to the Commission to have the vehicle titled in his or her name. In this instance the Vehicle Excise Tax closely resembles a sales tax imposed on the sale of other kinds of personal property.

The question is whether this tax is prohibited when a Sac and Fox tribal member purchases an automobile from an auto dealer, if that tribal member intends to park his or her car on Sac and Fox Indian Country. In this case, we are not concerned with the massive federal reservations which were a part of the ***Moe*** and ***Colville*** cases because, as the Commission has discussed in the income tax portion of this brief, the Sac and Fox Reservation was disestablished in favor of Oklahoma Statehood, leaving in its wake only scattered plots of Indian Country within an area otherwise under state jurisdiction. Therefore, this transaction occurs between a tribal member and a nonmember off of Indian Country. Generally, Indians going beyond reservation boundaries have been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state, ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 at 149 (1973). It cannot be contended that when a tribal member purchases groceries, hardware, appliances or other goods at businesses off of Indian Country, the tribal member would be exempt from applicable sales taxes just because those goods might be used on Indian Country in the future. The purchase of automobiles should not receive any different treatment. There is no reason or authority whereby the purchase of a car by an Indian should be exempt from tax in this situation.

Of course, the tribal members' tax burden in this case will be heavier than that borne by other auto buyers because the member will be subject to both the state and the tribal tax. However, this is only the natural consequence of being subject to concurrent jurisdiction of two different governmental entities, see e.g. ***Cot-***

ton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). The taxes are not discriminatory and there is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. There has been no showing in this case by the Tribe that there was ever an intent on the part of Congress to authorize this Tribe to pre-empt otherwise valid state taxes by imposing its own tax. Therefore, the state tax is due on the transfer of the vehicle regardless of whether or not tribal taxes have been paid. Also, the payment of the state tax is entirely borne by the tribal member such that the economic burden of the tax would never be felt by the Tribe and tribal self-government would not be infringed by it.

But most importantly, the vehicle excise tax is not pre-empted by federal law. In ***Moe*** the Court ruled, "Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments." In ***Moe***, the ***Treaty of Hell Gate***, 12 Stat. 975, set aside 1.25-million acres for the Flathead Reservation in Montana. In ***Colville***, the Colville Reservation contains 1.3-million acres in Washington established by Executive Order on July 2, 1872. This Court found at 447 U.S. 156 that the relevant treaties pertaining to the Colville tribes can be read to recognize inherent tribal power to exclude non-Indians or impose conditions on those permitted to enter. But in the case at bar, the Sac and Fox Treaty was discarded, the reservation disestablished, and the Tribe was not allowed the power to exclude non-Indians or impose any conditions on them because the federal government opened the land to a flood of white settlers who soon organized the territory for statehood. Therefore, the relevant statute, the Allotment Agreement in this case, contemplated that state law would be applied rather than excluded. As a result, tribal and federal jurisdiction is limited to the scattered plots of Indian Country which remain and the taxable transactions in this case do not occur within those areas.

In light of its policy and the intended result, the Congressional plan embodied in the Sac and Fox Allotment Agreement did not intend to pre-empt state taxing authority. Further, there is no

immunity for off-reservation activities that have traditionally been recognized in any of the controlling cases. The backdrop of Indian sovereignty does not provide any tradition of immunity with regard to this allotment agreement because it was never the intention of Congress to preclude the extension of state law in this area. Therefore, the Tenth Circuit improperly prohibited the vehicle excise tax as applied to tribal members in this case.

B. VEHICLE REGISTRATION FEES.

The vehicle registration fee is paid annually and is imposed on all vehicles owned within Oklahoma. Pursuant to title 47 O.S. 1991 §1132(A), the fee consists of a $15.00 fee for the use of the avenues of public access in this state in addition to a fee in lieu of all other taxes of 1 1/4% of the vehicle's factory delivered price for the first year, which is reduced to 90% of the previous year's fee in the following years.

Under title 47 O.S. 1991 §1103, the purpose of the fees is to provide funds for the general governmental functions of the state, counties, municipalities and schools and for the maintenance and upkeep of the avenues of public access of this state. The fees apply to every vehicle operated upon, over, along or across any avenue of public access within this state and when paid, are in lieu of all other taxes.

As with the other taxes at issue, the question with regard to these fees is whether they are pre-empted by federal law. The ***Moe*** and ***Colville*** cases dealt with similar taxes regarding vehicles owned by tribal members and used both on and off the reservations. The Court held in ***Colville*** that Washington was free to tax the use of those vehicles outside of the reservation but since the state had not tailored its tax to the amount of off-reservation use but taxed those vehicles at the rate all other vehicles were taxed, the taxes were held to be prohibited. Of course, the tax was prohibited because the relevant treaties, ***Treaty of Point Elliott***, 12 Stat. 927 (1855); ***Treaty with the Makah Tribe***, 12 Stat. 939 (1855); ***Treaty with the Yakimas***, 12 Stat. 951 (1855) can be read to recognize inherent tribal power to exclude non-Indians or impose

conditions on those permitted to enter, ***Colville***, at 447 U.S. 156. This was similar to the Navajo Reservation in ***McClanahan*** which set apart certain lands for the exclusive use of the Navajos as a permanent home in what had been their native country. That situation is not similar to the case at bar.

In this case, as has been discussed, the relevant statute is the Sac and Fox Allotment Agreement which did not set apart certain lands exclusively for the Sac and Fox in their native country, but instead it allotted the lands in severalty for the purpose of assimilation of the Sac and Fox into the general community of the state. Although the Agreement did not abolish tribal government, the autonomy of the government was eliminated. Accordingly, the Allotment Agreement does not pre-empt any state tax law. If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences, ***Oklahoma Tax Commission v. United States***, supra. Furthermore, it is interesting to note that the tribe in ***Moe*** only contested payment of Montana's personal property tax and agreed that a fee required for registration and issuance of state license plates for a motor vehicle could be exacted from Indians residing on the reservation, see 425 U.S. 469 and footnote 9.

The backdrop of Indian sovereignty does not provide a tradition of immunity with respect to the relevant statute in this case sufficient to pre-empt nondiscriminatory state laws. The Agreement provides no federal supervision or exclusive control upon which pre-emption can be based and nothing in the Act, its surrounding circumstances or its legislative history indicates any intent on the part of Congress to occupy the field or pre-empt the operation of state law in this area. This Court has cautioned against invalidating any state taxation absent the clearest mandate, ***Michelin Tire Corp. v. Wages***, 423 U.S. 276 (1976). Congress has declined to extend such a mandate to the Indians in this case. Given the attitude of Congress in the Allotment Agreement, Congress never intended to prevent Oklahoma from levying these taxes, which is the primary consideration in the pre-emption inquiry.

The state is within its authority to collect these motor vehicle taxes for the further reason that the state has a greater interest in the revenues than has the Tribe. In sorting out these competing interests, the Court has provided this guidance in the ***Colville*** decision at 447 U.S. 156-157:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

In the case at bar, the state has the strongest interest in imposing its annual registration fee as opposed to the Tribe because the state has the sole obligation of building and maintaining roads in Oklahoma as well as providing related government services to the motoring public. The tribal member taxpayers in this case are the direct beneficiaries of these roads and services which are not provided by the Tribe. Also, the registration fees are directed at off-reservation value.

In Oklahoma, neither the Sac and Fox, nor any of the other forty different tribes located here, build or maintain streets, roads or highways since the Indian Country is broken up into small scattered tracts and the State provides all the necessary roads in the first place. The Sac and Fox have built driveways or parking lots on their land, but this is nothing that any other private landowner would not do. However, the total mileage of driveways built by the Sac and Fox is de minimum compared to the over 111,000 miles of roads provided by the State and local governments. However, the Tribe argues that tribal employees park their cars on Indian Country for a much greater part of the workday than the drive time in which those cars are on State jurisdiction roads. The State submits that this may be true but irrelevant because

the value of an automobile is principally realized by using it to travel across the roadways rather than parking it in a parking lot. The registration fees are therefore aimed at off-reservation value since the use of a vehicle in Oklahoma is necessarily off-reservation only.

The State vehicle registration system also provides safety and security to the motoring public. The State registration provides information on the ownership of vehicles that can be accessed by police when vehicles are involved in criminal activity. Also, the State requires vehicle registrants to carry automobile insurance to provide financial responsibility for damage that the operator of a vehicle may cause. The State title laws protect the ownership interest in vehicles as well as the security interest of financial institutions who lend on the vehicle as collateral by providing a statewide filing system to record this information with the Tax Commission and other State law enforcement agencies that safeguard the vehicle from theft, title counterfeiting, title laundering, or tampering with odometer readings. If the Tax Commission is compelled to accept at face value a title from any one of forty different tribal governments in this state, the functions of the State registration system would be compromised. If motor vehicle titles could be easily obtained at low cost from a variety of tribal governments which have less experience and sophistication in maintaining proper controls over a registration system, along with the fact that tribal records are inaccessible to state agencies, then that situation would result in unacceptable losses to auto dealers, banks, insurance companies and automobile owners and buyers as well as hindering law enforcement.

On the other side of the scale, the only thing the Tribe offers for its registration is the opportunity for the registrant to pay tribal taxes. The Tribe will provide no roads or any of the attendant governmental services that the State provides to vehicle owners. Under the balancing approach, the Tribe offers little of anything in return for its taxes while the State provides the totality of transportation and governmental services to these taxpayers. This is a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes

fall. Since the federal legislation disestablishing the reservations in Oklahoma has left the Tribe with no duties or responsibilities respecting road building and related services, it cannot be contended that Congress intended to leave to the Tribe the privilege of levying this tax to the exclusion of similar State taxes. The State does not contend that the Tribe should be prohibited from levying this or any tax, but the State does contend that the tribal tax levy does not oust the imposition of State taxes on tribal members' activities off of Indian Country.

This Court ruled in ***Oklahoma Tax Commission v. United States***, at 319 U.S. 608-609, that Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for the Indians, and their children, schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Within the circumstances of this case relating to taxation of Sac and Fox tribal members, there is nothing in this burden which frustrates tribal self-government or runs afoul of any congressional enactment dealing with the affairs of reservation Indians.

CONCLUSION

For these reasons, the Oklahoma Tax Commission respectfully requests this Court to reverse that part of the opinion of the Tenth Circuit Court of Appeals which enjoined and prohibited the Commission from collecting income taxes on wages earned by Sac and Fox tribal members from tribal employment, and from enforcing the vehicle excise tax and registration laws against tribal members who properly licenses their vehicles with the Tribe and allow the Commission to collect those taxes.

Respectfully submitted.

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No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF ON THE MERITS BY RESPONDENT

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STATEMENT OF THE CASE

This limited Statement of the Case is submitted to correct what Respondent perceives to be certain inaccuracies or omissions in the Statement of the Case provided by Petitioner. The Sac and Fox Nation is a federally recognized Indian Tribe organized pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. §501, *et seq.*, and has been vested with all the governmental rights of a Tribe organized pursuant to the Indian Reorganization Act by the federal Charter issued to the Sac and Fox Nation by the Secretary of the Interior. C.A. App. Exh. 4, Art. VII. The "Indian Reorganization Act Provisions" of the Charter extended Sections 2, 4, 7, 16, and 17 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and all other rights or privileges secured to a Tribe organized pursuant to the Indian Reorganization Act, to the Sac and Fox Nation. The Sac and Fox Nation, then, is also organized pursuant to the Indian Reorganization Act, and vested with all of the rights, powers, and privileges of such Tribes, having followed the Congressional prescription, 25 U.S.C. §503, to regain any rights or powers which it arguably may have failed to retain or receive by virtue of its initial exclusion from the Indian Reorganization Act, or through earlier legislation.

Respondent also takes exception to Petitioner's continued use of the term "former Sac and Fox Reservation." While both parties to this action have vigorously argued the point, no Court has ruled that Respondent's Reservation created by the Treaty of 1867, 15 Stat. 495, has been abolished. Further, the record shows that the original allotments pursuant to the Sac and Fox Allotment Agreement, 26 Stat. 750 (hereinafter "Allotment Agreement"),

were, with limited exceptions, taken in two compact contiguous areas, C.A. App. Exh. 15, in the northeast and southwest corners of the 1867 Reservation, and not, in general, "randomly scattered throughout the area" as stated in Petitioner's brief.

The existing records revealed by research with respect to the negotiation and transmittal to Congress of the Sac and Fox Allotment Agreement are included in the record. C.A. App. Exh. 12. There is no statement therein that the Sac and Fox Reservation will no longer be a reservation. The offer of a fixed value for the surplus land – as opposed to the Tribe selling the land to settlers itself for as much as it could obtain with the proceeds being paid into the Treasury – was not presented as a result of any stated desire to extinguish the reservation. Instead, the Commissioners indicated that it would be a mistake for the Tribe to sell the land to white people themselves because they would not be able to obtain at private sale the price the government was offering. C.A. App. Exh. 15.

The presumption in the Allotment Agreement of continuing Sac and Fox authority over the reservation after the 1891 allotment is further supported by the Record. C.A. App. Exh. 35 (National Council Records Of 1893, p. 2-5 [establishing Tribal offices and pay scale, appropriating funds for support of the government]; p. 7 [Probating estate of Eva Wah-kol-li]; p. 11 [Protest of federal plans to allow licensed trader's to locate on Agency lands as "contrary to the terms of our late treaty with the United States"]; p. 13 [*"Permission granted Lee Patrick to build and maintain a barn on land leased him by Mary A. Means and permission to remain on reservation."*]); C.A. App. Exhs. 37,

38, and 39 (Reservation Trader's Licenses issued by Commissioner of Indian Affairs for Traders on the Sac and Fox Reservation in 1897, 1895, and 1894, *see* 25 U.S.C. §262); C.A. App. Exhs. 40, 41, 42, and 43 (Interior Department Letters in 1904, 1908, 1909, and 1915 requiring Indian Trader's licenses on the *Sac and Fox Reservation*); C.A. App. Exhs. 49 and 50 (1893 Letter from the Secretary of the Interior and Commissioner of Indian Affairs stating that Oklahoma has no "right to enter upon the reservation for the purpose of taxing employees of the government and licensed Indian traders."). Simply stated, all of the facts in the record show that the Sac and Fox and the Interior Department both believed that the Sac and Fox Reservation remained intact after the allotment, and both treated the area as a continuing Indian Reservation through at least 1915, long after Oklahoma statehood.

Even if the Court were to conclude that the original boundaries of the 1867 Reservation were extinguished, it is clear that the retained Tribal lands and all of the original allotments together constituted a diminished Reservation. Both Petitioner and the Solicitor General have failed to mention that it was only the "residue" of the lands remaining after the trust patents for the allotments were issued – the lands which were neither allotted nor retained by the Sac and Fox Nation – which became public lands of the United States for the limited purpose of being opened for white settlement. Article V, Sac and Fox Allotment Agreement of February 13, 1891, 26 Stat. 749. As to the Allotments, the Sac and Fox Nation was never compensated for these properties, and they were never declared to be public lands of the United States.

Finally, there is no support in the Record for the statements of Petitioner that "no one resides at the tribal headquarters" and "all roads in Oklahoma are constructed and maintained by the state and the Tribe provides none of these services." Both of these statements are untrue. The Sac and Fox Principal Chief resides in a Tribal building at the headquarters. On the same tract of land which contains the tribal headquarters buildings, the Tribe has a mobile home park in which a number of people reside, both Indian and non-Indian. Many persons, Indian and non-Indian, live on Sac and Fox Indian allotments and in several hunderd units of the Sac and Fox Housing Authority. Further, the Tribe, with the assistance of the federal government, has constructed or provided assistance in maintaining or repairing a number of streets, roads, and bridges within the Reservation, and is currently scheduling more such work.

SUMMARY OF THE ARGUMENT

Consistent with its position in the Courts below, Respondent believes that the taxing authority of the State of Oklahoma at issue herein can be resolved in the Nation's favor simply by reference to the Indian Country status of the Tribal lands, housing units, and retained Indian allotments and straightforward application of *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); and *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980) to this action. Respondent, however, has analyzed the historical and conceptual development both of the

term "Indian Country," and the precise status of the Sac and Fox Nation's territorial domain within the meaning of the term "Indian Country" due to the unusual and unique positions taken with respect thereto by the Petitioner and the United States as *Amicus Curiae*.

Research reveals that the true term of art descriptive of the area for the exercise of tribal self-government is "Indian Country" which includes within the tripartite statutory definition of that term (a) Indian Reservations; (b) Dependent Indian Communities; and (c) Indian trust or restricted allotments. When a tract of land satisfies the test of any one of these classifications, it is Indian Country for jurisdictional purposes. When considered in light of the statutory definition, 18 U.S.C. §1151, and the resulting rule regarding the level of proof needed to find an extinguishment of reservation boundaries, it is clear that there is nothing in the record of this case which would support a decision extinguishing the 1867 reservation boundaries. However, even if the original boundaries were found to be extinguished, it appears that a diminished reservation consisting of retained tribal and allotted lands resulted from the allotment process. Finally, even if the allotted lands were held to not constitute a part of the diminished reservation, their inclusion in the statutory term "Indian Country" means that they are still within the jurisdiction of the Nation and outside of the authority of the State.

The essence of federal Indian law, as expressed in the Constitution, Treaties, Statutes, and Court decisions, is the allocation of governmental authority concerning persons, places, and subject matter between the Federal, Tribal, and State governments. Depending upon one's philosophy this allocation could be made in the first instance either by Congress or by the Courts. Respondent

submits that it is Congress, through exercise of its powers pursuant to the Commerce Clause and Treaty Clause, as effectuated by the Supremacy Clause, which should be the final arbiter of policy in this regard. Traditional notions concerning the allocation of jurisdiction between the Federal, Tribal, and State governments within the Indian Country as expressed in *Worcester v. Georgia*, 6 Pet. 515 (1832) and recent Congressional legislation, *see* H.R. CONF. REP. No. 102-261, on P.L. 102-137, 1991 U.S.C.C.A.N. Leg. Hist. 379, should prevail in the absence of a clear Congressional determination to the contrary.

In analyzing this attempt by the State to intrude its laws into the Indian Country of the Sac and Fox Nation, then, it is important to begin the analysis with the relevant Constitutional provisions, treaties, and statutes. When these materials are viewed in light of the traditional rules of interpretation applied by this Court, it is clear that at the time of its creation the State of Oklahoma received no authority to levy or collect the taxes at issue here, and has never been granted specific authority from Congress to tax income or personal property within the Indian Country of the Sac and Fox Nation.[1] Further, the State has not complied with the procedure set out by statute to acquire general civil or criminal jurisdiction over the lands of the Nation. Given the complete absence of State civil or criminal jurisdiction concerning Indians within the Indian Country of the Sac and Fox Nation, and

[1] Congress clearly knows how to authorize State taxation of Indian Tribes within Oklahoma: Act of March 3, 1921, §5, 41 Stat. 1249 (Osage Oil and Gas); Act of March 3, 1921, §26, 41 Stat. 1225 (Quapaw Minerals).

the Sac and Fox Treaties which go so far as to expressly authorize Tribal punishment of non-Indians within the Nation's territory, it is clear that the State cannot tax the income or personal property at issue herein when the income is earned, and the property bought and held within the Indian Country. The Court should decline the Petitioner's invitation to redraw the allocation of authority within the Sac and Fox Indian Country absent clear and explicit Congressional directives to do so, and remit Petitioner to the Congress for special legislation or its own legislature for compliance with 25 U.S.C. §§1322-1326.

ARGUMENT

I. THE PROPER QUERY HERE IS WHETHER THE SAC AND FOX NATION HAS RETAINED INDIAN COUNTRY SUBJECT TO ITS GOVERNMENTAL JURISDICTION.

Both Petitioner and the United States, as *Amicus Curiae*, appear to place some magical connotation upon the term "reservation," under the apparent theory that a "reservation" is somehow imbued with more status than other types of Indian Country. However, a review of the usages of Congress and this Court shows that all Indian Country, including Indian Reservations, Dependent Indian Communities, and Indian Allotments, is jurisdictionally indistinguishable.

The term "Indian Country" is perhaps first generally defined by statute in the Act of June 30, 1834, 4 Stat. 729 (1834) as "all that part of the United States . . . to which

Indian title has not been extinguished," and at that time included within its terms the area which now comprises the State of Oklahoma. The jurisdictional effect of the early statutes defining certain lands as Indian Country on the allocation of authority within the Indian Country, was summarized by the noted Indian law scholar and Associate Solicitor for the Department of the Interior, Felix Cohen, in his HANDBOOK OF FEDERAL INDIAN LAW 6 (1942 Ed.), the official governmental treatise on the subject,[2] as follows:

> Indian Country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all.[3]

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[2] FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW vii-ix, (1982 Ed.), Michie Bobbs-Merrill, Pub. (Hereinafter referred to as "COHEN").

[3] The complete prohibition as to the application of state law in the Indian Country has been modified to the extent Congress has deemed proper. 18 U.S.C. §1161 (liquor laws); Act of February 15, 1929, Ch. 216, 45 Stat. 1185 (health and education)(25 U.S.C. §231); 25 U.S.C. §§232, 233 (New York); 18 U.S.C. §1162 (criminal jurisdiction in Public Law 83-280 states); 28 U.S.C. §1360 (civil jurisdiction in Public Law 83-280 states); 25 U.S.C. §§1321 *et seq.* (assumption and retrocession of civil or criminal jurisdiction by states which are not mandatory Public Law 83-280 states). Oklahoma was not granted, and has never assumed, jurisdiction over Indian country within its borders pursuant to Public Law 83-2380. Although this Court has recently allowed some State laws to apply to some persons within the Indian Country absent specific Congressional authorization, *Oklahoma Tax Commission v. Citizen Band Potowatomi Tribe*, 111 S.Ct. 905 (1991), Respondent respectfully suggests that policy matters concerning the further allocation of authority to the States concerning the Indian Country should be resolved by Congress, and not by the courts.

Although the 1834 definition of Indian Country was not included in the Revised Statutes of the United States, and therefore repealed, it provided a useful mechanism for the Court to apply statutory laws relating to "Indian Country" and "Indian Reservations." *Donnelly v. United States*, 228 U.S. 243, 269 (1913). In *Bates v. Clark*, 95 U.S. 204, 209 (1887) the Court had stated:

> It follows from this that all the country described by the act of 1834 as Indian Country remains Indian Country so long as the Indians retain their original title to the soil, and ceases to be Indian Country whenever they lose that title, in the absence of any different provisions by treaty or by act of Congress.

In a series of now famous cases, the Court developed a definition of "Indian Country" at common law in order to give effect to the several different Congressionally authorized types of Indian land tenure which included Indian reservations both within a Tribe's aboriginal area, and on lands previously held by the United States but set aside for the use of the Tribe by various mechanisms, *Bates v. Clark*, 95 U.S. 204 (1887); *Donnelly v. United States*, 228 U.S. 243 (1913), trust and restricted Indian allotments whether within or without continuing Indian Reservations, *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926), and areas set aside for the use and occupancy of Indians (dependent Indian communities) although not called a "reservation". *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. McGowan*, 302 U.S. 535 (1938).

Although Indian Country status had originally been tied to aboriginal ownership of the soil, the Court in *Donnelly v. United States*, supra, extended the application of the term to lands reserved for tribes carved from the public domain. Prior to 1948, however, Tribal ownership remained the benchmark indicia of Indian Country status for Indian reservations as a historical consequence of the 1834 act. In pre-1948 decisions, as well as those later cases which rely without critical analysis upon such decisions while ignoring the plain import of this statute,[4] the ownership of title to the soil was often critical to the status of land as Indian Country or "reservation" land.

These pre-1948 decisions left open the question of whether land within the exterior boundaries of an Indian reservation which was held in fee (in other words an "open" reservation) was Indian Country. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 8 (1942 Ed.). The practical issue of this "open reservation" question was whether federal and tribal jurisdiction remained viable in reservation areas where allotments had been taken and the surplus sold, or where trust periods had expired, or where restrictions against alienation had been removed. In some cases, the courts simply noted that the lands had been allotted or sold to non-Indians, and declared that the area was no longer a reservation for some jurisdictional purposes, *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943). In others, it appeared that the issuance of patents within a reservation made no jurisdictional difference. *United States v. Thomas*, 151 U.S. 577 (1894); *United States v. Celestine*, 215 U.S. 278 (1909).

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[4] *Seymour v. Superintendent*, 368 U.S. 351 (1962).

In 1948, Congress in the exercise of its Constitutional authority over Indian affairs, U.S. CONST., ART. 1, SEC. 8, CL. 3, resolved this issue in favor of exclusive federal and tribal jurisdiction over trust and fee patented lands within reservations, and codified the Supreme Court's other existing common law classifications of Indian Country in the Act of June 25, 1948, 62 Stat. 757, codified in its present form at 18 U.S.C. §1151, which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian Country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

United States v. Mazurie, 419 U.S. 544, 547 (1975). Oklahoma was not excepted from the terms of this Act. The impact of this Congressional action was to render obsolete Court decisions which tied the Indian Country jurisdictional status of Indian reservations to issues of land title, and to define by statute the territorial area for the operation of tribal government.[5] The question of continuing land ownership remains statutorily relevant only in the context of Indian allotments outside Indian reservations. The Court, while often speaking in terms of "reservation" or "allotment" or "dependant Indian community"

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[5] *See*, generally, COHEN, supra note 2, at pp. 27-46.

as relevant in a particular circumstance has, since 1948, clearly held that "Indian Country" is the recognized term of art defining the territorial area for the exercise of tribal self-government. *United States v. Mazurie*, 419 U.S. 544 (1975);[6] *Decoteau v. District Court*, 420 U.S. 425 (1975);[7] *United States v. John*, 437 U.S. 634 (1978);[8] *Solem v. Bartlett*, 465 U.S. 463 (1984),[9] and the Congress has consistently

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[6] "Cases such as *Worcester*, supra, and *Kagama*, supra, surely establish the proposition that Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.' " *Mazurie* at U.S. 557.

[7] In footnote 2 of the opinion, the Court stated: "If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government 'notwithstanding the issuance of any patent' . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are 'Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.' While §1151 is concerned on its face, only with criminal jurisdiction the Court has recognized that it generally applies as well to questions of civil jurisdiction." (citations omitted). After concluding that the Sisseton-Wahpeton reservation had been disestablished, the Court concluded: "In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. §1151(c)." *Id.* at U.S. 446.

[8] At page 649 of the opinion, the court stated: "With certain exceptions not pertinent here, §1151 includes within the term 'Indian country' three categories of land. The first, with which we are here concerned, is [Indian reservations]." In the accompanying footnote 17, the Court stated in part: "Inasmuch as we find in the first category a sufficient basis for the exercise of federal jurisdiction in the case, we need not consider the second and third categories [of Indian country]."

[9] In footnote 8 at page 467 of the opinion the Court stated: "Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of Congress fail within the exclusive criminal jurisdiction of federal and tribal courts." (citations omitted).

referred to this Indian Country definition in civil legislation regarding Indians.[10]

II. THE SAC AND FOX INDIAN COUNTRY CONSISTS OF ITS RESERVATION, THE ALLOTMENTS, AND ANY DEPENDENT INDIAN COMMUNITIES WITHIN THE 1867 RESERVATION BOUNDARIES

A. THE 1867 SAC AND FOX RESERVATION REMAINS UNDIMINISHED AND CONSTITUTES INDIAN COUNTRY.

In response to this newly codified statutory definition, this Court adopted a new rule to determine the subsequent Indian Country status of reservation areas in *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Mattz v. Arnett*, 412 U.S. 481 (1973); *DeCoteau v. District Court*, 420 U.S. 425 (1975), and *Solem v. Bartlett*, 465 U.S. 463 (1984). These cases teach that once an area of land has been set apart as an Indian reservation, all tracts within that area remain Indian Country until the reservation is extinguished by Congress. The corollary to this rule is that the statute or treaty extinguishing the reservation must be

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[10] *See*, for example, 28 U.S.C. §1360; 25 U.S.C. §§1322-1326 (Acquisition by the States of Civil Jurisdiction in the Indian Country); 25 U.S.C. §1903(10) Indian Child Welfare Act; 25 U.S.C. §3202(8) Indian Child Protection and Family Violence Prevention. This list is by no means exhaustive.

clear on its face,[11] or, if the statutory language could be interpreted to extinguish the reservation but is ambiguous, the legislative history and tribal understanding must clearly indicate an intent to terminate reservation status. *DeCoteau v. District Court,* supra. Anything less than this clear language or showing of intent and understanding will result in a finding that the reservation continues as Indian Country due to the traditional rules that ambiguities are to be resolved to the benefit of the Indians, and that Indian treaties and agreements must be interpreted as the Indians would have understood them. *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976); *DeCoteau v. District Court,* supra; *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973); *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1916); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

The Petitioner argues that "cede" and "convey" type language in the Sac and Fox Allotment Agreement is all that is necessary to extinguish the 1867 Reservation.

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[11] In *Mattz v. Arnett,* 412 U.S. 481 (1973), the Court gave examples of language it considered clear expressions of the intent to extinguish reservation boundaries at footnote 22, page 504: "The Smith River reservation is hereby discontinued" from 15 Stat. 221 (1868); the North Half of the Colville Indian Reservation "be, and is hereby, vacated and restored to the public domain" from 27 Stat. 63 (1892); "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished" from 33 Stat. 218 (1904). The Ponca, Otoe, and Missouria reservations referenced were in Oklahoma, and the lack of such clear language with respect to the Sac and Fox Nation's Reservation indicates that Congress only intended to extinguish these three particular reservations in Oklahoma.

However, it should be noted that the language of the Sac and Fox Allotment Agreement, 26 Stat. 749 (1891), is similar to language which was determined to be suited to disestablishment but ambiguous in *DeCoteau v. District Court,* supra. While in *DeCoteau* the resulting resort to the surrounding circumstances and legislative history showed that the Congressional action in question was clearly intended and understood to terminate the Reservation and such evidence weighed against the finding of continued reservation status for the land in question, in this case the facts presented to the lower court show a complete lack of support for such a finding. The language of the Sac and Fox Allotment Agreement is substantially similar to earlier Sac and Fox treaties in which they ceded land to the United States, yet retained governmental rights and authority, and the right to live and hunt within, and otherwise control, the "ceded" area.

Words such as "cede" and "relinquish" were used in many of the Sac and Fox treaties. However these words provided little indication to unlettered tribal leaders[12] as to whether or not a Sac and Fox Reservation was to be disestablished, created, or moved to another location. The Sac and Fox Treaty of November 3, 1804, 7 Stat. 84, provided that the Sac and Fox "do hereby cede and relinquish forever to the United States, all the lands

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[12] Note that most of the National Council of the Sac and Fox Nation at the adoption of the 1885 constitution did not even have English names, and, apparently, could not read and write the English language. C.A. App. Exh. 1, p. 8. Further, Mah-Ko-Sah-Toe and Moses Keokuk, the Principal Chief and First Assistant Principal Chief, executed the Allotment Agreement by their mark, being apparently unable to read or write English.

included within the above-described boundary." *Id.* at Article 2. Although the land was ceded and relinquished forever, the same treaty provided in part:

> ART. 7. As long as the lands *which are now ceded* to the United States remain their property, the Indians belonging to the said tribes, shall enjoy the privilege of living and hunting upon them. (Emphasis added).

The Sac and Fox were allowed to live upon the land they ceded and use it as they saw fit.

Other treaties likewise make it clear that the "cede" and "relinquish" language was not determinative. In the Treaty of July 15, 1830, 7 Stat. 328, the land was ceded, but Article 1 of the Treaty provided:

> But it is understood that the lands ceded and relinquished by this Treaty, are to be assigned and allotted under the direction of the President . . . to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting, and other purposes.

In the Treaty of Sept. 21, 1832, 7 Stat. 374, the Sac and Fox once again ceded land to the United States. However the Treaty provided at Article 2:

> ARTICLE II. Out of the cession made in the preceding article, the United States Agree to a reservation for the use of . . . tribes . . .

The Treaty of May 6, 1861, 12 Stat. 1171, also contained "cede, relinquish, and convey" language. But Article 3 of that Treaty further provided:

> The reservation herein described shall be surveyed and set apart for the exclusive use and benefit of the Sacs and Foxes of Missouri, and the remainder of the Iowa lands shall be the tribal reserve of said Iowa Indians for their exclusive use and benefit.

Thus many Sac and Fox treaties would have the tribe cede land to the United States, and the United States would then set aside all, or a portion of, the land which was ceded for the use of the Sac and Fox.

Other treaties make it clear that the Sac and Fox retained rights and privileges in land which was ceded to the United States. The Treaty of October 21, 1837, 7 Stat. 543, states in part:

> ARTICLE 1st. The Missouri Sac and Fox Indians make the following cessions to the United States: . . .
>
> Second. Of all the right *to locate, for hunting or other purposes, on the land ceded* in the first article of the treaty of July 15 1830, which, by the authority therein conferred on the President of the United States they may be permitted by him to enjoy. (Emphasis added).

This indicates that the Sac and Fox gave up rights to land ceded in 1830 by this treaty which was made in 1837. It is clear that the Sac and Fox could cede lands and retain a reservation in the same land. The "cede" and "relinquish" language in the 1891 Allotment Agreement must be considered in light of these previous Sac and Fox treaties.

Given the long history of the United States using cession language in Sac and Fox Treaties without always extinguishing the tribal reservation or rights in the land ceded, the cession language, standing alone, is ambiguous at best. Since the Sac and Fox were not to be moved

by the 1891 Allotment Agreement and there was nothing in the negotiations which specifically stated that the reservation would cease to be a reservation, there was no reason for the Sac and Fox to believe the reservation was destroyed. Further, as noted in the introduction to this Brief, the record reflects that the Interior Department and the Sac and Fox National Council, from the time of the Allotment Agreement through at least 1915, acted consistently with the notion that the 1867 Reservation boundaries had not been extinguished.

Treaties or agreements said to affect reservation boundaries must be construed liberally in favor of the Tribe, *Choctaw Nation v. United States*, 318 U.S. 423 (1943); *Choate v. Trapp*, 224 U.S. 665 (1912); *Creek Nation v. Hodel*, 851 F.2d 1439 (D.C. 1988), and interpreted as the tribe would have understood them – a land transaction not a disestablishment of the reservation. *Choctaw Nation v. United States*, supra. Ambiguity must be decided in favor of the tribes.

The ambiguity in this Agreement must also be interpreted in favor of the Sac and Fox because of the one-sided nature of the Agreement. In *Sac and Fox Tribe v. United States*, 340 F.2d 368 (Ct.Cl. 1964), the Court found that:

> In 1889 and 1890 there was great political pressure on the Government to provide more land for white settlers. The result of this political pressure became apparent in the negotiations between the Jerome Commission and the Sac and Fox Tribes. Not only were the tribes told by the land commissioners that they must sell; they were admonished that they could sell only to

> the United States, and only when the United States was ready to buy; that they could not even lease or mortgage the lands. Finally, they were told by the Commission in language of unmistakable import that $1.25 per acre was all they could get because that was all the Commission and the Congress would approve. They were even advised by one of the Commissioners that 'we have offered you more lands and made a better offer than the law provides for.' (Proceedings of the Jerome Commission, National Archives, Record Group 75, letters received 4738/1894, encl. 2.) The combined effect of all of these admonitions could only be interpreted as a flat ultimatum to the illiterate and unsophisticated representatives of the Sac and Fox that they had better take $1.25, 'or else,' in common parlance. . . .
>
> Even if we assume that the negative characterization of the conduct of the Government by the Indian Claims Commission, as above quoted, is correct, the fact remains that this sale was negotiated by Government coercion and compulsion exerted upon appellants to such a degree as to constitute duress.

Id. at 374. *See, The Cherokee Nation v. United States*, 9 Ind.Cl.Comm. 162, 234-35 (1961). This case then, is no *DeCoteau v. District Court*, in which the tribal representative voluntarily agreed that the reservation should be terminated, and Congress clearly intended to do so. Instead, it was a contract of adhesion which should be interpreted strictly against the government and in favor of the Sac and Fox. There is no doubt that Congress knew exactly how to abolish Indian reservation boundaries in

Oklahoma when it chose to do so.[13] The reservation of the Sac and Fox has not been disestablished, and the exclusive power of the Sac and Fox Nation to tax within its reservation is without question.

B. IF THE 1867 RESERVATIONS BOUNDARY WAS EXTINGUISHED, THE RESERVATION WAS DIMINISHED BUT NOT ABOLISHED.

If the Court should determine, in the face of the uncontroverted facts in the record showing that the tribal leadership and the Interior Department both believed that the 1867 Reservation continued during the two decades immediately following the Allotment, that the Allotment Agreement extinguished the original 1867 Reservation boundaries, it is clear that the Allotment Agreement simply diminished the land area of the Reservation to the retained tribal land and the parcels allotted to individual Indians.

As noted by the Solicitor General, Article II of the Allotment Agreement expressly excepted 800 acres from the operation of the Allotment Agreement and was to remain "the property of said Sac and Fox Nation, to the full extent that it is now the property of said Nation" – in other words, part of the Sac and Fox Reservation. Further, it is difficult to square the notion of the Solicitor General that the Allotments to individual Indians was somehow

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[13] See, Act of April 21, 1904, Ch. 1402, Sec. 8, 33 Stat. 189: " . . . That the reservation lines of the said Ponca and Otoe and Missouria Indian reservation be, and the same are hereby abolished. . . . "

compensation to the Nation for the loss of the lands allotted to individual Indians. The Agreement clearly pays for only the "surplus" land remaining after the Tribal lands and allotted lands are subtracted from the area of the Reservation, for if additional allotments were necessary, the amount of compensation was reduced. Allotment Agreement, Article 4. If the individuals are viewed as legally distinct from the Nation, then the Nation, having not been paid for the Allotments, received no compensation for that land. If such is the case, then the United States still owes the Nation for the Allotted property as it was taken without just compensation in violation of the Fifth Amendment to the Constitution. *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). On the other hand, if the allottees and the Nation are viewed as the same legal entity, then the Nation simply received that which it already admittedly owned – certainly not "consideration" in classical contract law analysis, and not "compensation" pursuant to the Fifth Amendment.

Further, and in addition to the facts in the Record showing that the Interior Department consistently treated the allotted lands as Reservation lands for over twenty years after Allotment, the Allotment Agreement itself expressly states that "It is further agreed that as soon as such allotments are so made, and approved by the Department of the Interior, then *the residue* of said tract of country, shall, as far as said Sac and Fox Nation is concerned, become public lands of the United States, and under such restrictions as may be imposed by law, be subject to white settlement." Allotment Agreement at Article V. Given the prior history of "cession" treaties, the

failure to pay the Nation for the Allotments, the provisions of the Agreement which presume continuing control over the affairs of the allottees, Allotment Agreement, Article IV, Para. 5, and the taking of the allotments in what is essentially two contiguous but separated tracts, C.A. App. Exh. 15, it is clear that if the original boundaries were extinguished, a diminished Reservation consisting of the retained tribal land and the allotments remained set apart for the use of the Sac and Fox Nation, and that Congress anticipated and intended that result. 26 The Chronicles of Oklahoma 457.

The Acting Commissioner of the Department of Interior, in a letter dated December 11, 1908, explained the status of business leases upon the reservation to the Superintendent of the Indian School at the Sac and Fox Agency in Oklahoma. This 1908 letter stated in part:

> The question of the individual allottee leasing land for business purposes has been gone into very thoroughly, and the Office is of opinion that while the law authorizes the leasing of Indian allotments for business purposes, it does not contemplate that the leasing of an allotment relieves the lessor from compliance with the law which requires the taking out of a license, furnishing statements of character, and the filing of a $10,000 bond.
>
> In issuing a lease, the Office prescribes no regulations as to the trade to be conducted, and there does not seem to be any valid reason why persons holding business leases on your **reservation,** should not comply with section 519, Regulations of the Indian Office, 1904 . . .

> Under the circumstances, the Office can see no reason for the lessor of Indian allotments holding business leases on your **reservation,** declining to take out a license and give bond . . . If, it should be shown that the lessors on your **reservation,** holding business leases decline to do this, you are instructed to make a full report . . .
>
> The records of the Office show that the following named persons hold business leases on your **reservation** . . . (emphasis added)

See C.A. Add. Exh. 41. There is little doubt that the Department of Interior would not have referred to the Sac and Fox reservation as a reservation unless they thought the reservation still existed. The above letter was written approximately seventeen years after the Allotment Agreement. It should also be noted that the letter was written after Oklahoma statehood.

C. EVEN IF THE SAC AND FOX RESERVATION WAS ABOLISHED, THE NATION RETAINS INDIAN COUNTRY CONSISTING OF TRIBAL TRUST LANDS, DEPENDENT INDIAN COMMUNITIES, AND INDIAN ALLOTMENTS.

The Court, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe,* 111 S.Ct. 905 (1991), determined that Tribal trust lands were the equivalent of a reservation for purposes of the allocation of jurisdiction between the Federal, Tribal, and State governments. Several areas exist within the original 1867 Reservation boundary, consisting mainly of Tribal Housing Authority cluster units, which are set apart to provide homes for Indians because

of their status as Indians and would constitute a classical Dependent Indian Community. 18 U.S.C. §1151(b). Further, there is no doubt that the allotments which are still in trust constitute Indian Country pursuant to 18 U.S.C. §1151(c). *DeCoteau v. District Court*, supra.

The Oklahoma Tax Commission would have the Court determine that none of the cases dealing with the "reservation" aspect of Indian Country should apply here, and the United States, as *Amicus Curiae*, proposes a unique new test to determine whether a "reservation community" exists. Neither position is supported by law or logic. As noted in Proposition I, above, this Court has repeatedly indicated that if a particular tract of land satisfies any portion of the tripartite definition of Indian Country, the tract is to be treated jurisdictionally as any other tract of Indian Country. In order to reach the result proposed, the Court would have to ignore two hundred years of jurisprudence in this Court, as well as the Congressional determination that all three types of land equally constitute Indian Country. Simply stated, no good reason exists to ignore the original meaning of the term Indian Country as set out by Cohen's 1942 Handbook shortly prior to the enactment of 18 U.S.C. §1151, let alone to ignore the Congressional enactment of the Indian Country statute.

Therefore, even taking the view most adverse to the Sac and Fox Nation, its Indian Country must consist of Tribal lands, the individual trust allotments, the dependent Indian communities within the 1867 boundaries, and lands afterward acquired by the United States in trust for the Tribe or individual Indians within the 1867 boundaries.

III. THE STATE OF OKLAHOMA HAS, AB INITIO, BEEN PRE-EMPTED FROM TAXING INDIAN COUNTRY INCOME AND PERSONAL PROPERTY WITHIN THE SAC AND FOX NATION.

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 178-179 (1973) the Court stated:

> . . . a startling aspect of this case is that appellee apparently conceded that, in the absence of compliance with 25 U.S.C. 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected . . . Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case.

Indeed, conferring civil and criminal jurisdiction upon a state may still leave the state without taxing authority over Indians in Indian Country. *Bryan v. Itasca County*, 426 U.S. 373 (1976). Research does not reveal any case except *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, 111 S.Ct. 905 (1991), which has held that a state may tax Indians within any part of Indian Country where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the states taxing power. In light of the recent Congressional determination that an Indian is an Indian, the Court should overrule that part of *Potawatomi* which allowed state taxation of non-member Indians absent compliance with 25 U.S.C. §§1321-1326. *See* Act of October 28, 1991, P.L. 102-137, 105 Stat. 646, amending Section 8077 of P.L. 101-511, 104 Stat. 1892; H.R. Conf. Rep. No. 102-261, 1991 U.S.C.C.A.N. Leg. Hist. 379.

A. CONGRESS PRECLUDED STATE AUTHORITY IN THE INDIAN COUNTRY FROM THE BEGINNING.

It rests with Congress to determine when the guardianship relation shall cease. Thus far Congress has not terminated that relation with respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers. *Board of County Comm'rs. of Creek County v. Seber*, 318 U.S. 705, 718 (1943). (citations omitted).

In our opinion, the purpose expressed in [Section 1 of the Oklahoma Enabling Act, 34 Stat. 167] to reserve to the government of the United States the authority to make laws and regulations in the future respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulations on the subject.

. . . .

> The reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new state is clearly supportable under the Federal Constitution, art. 1, §8, which confers upon Congress the power "to regulate commerce . . . with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a state. *Ex Parte Webb*, 225 U.S. 663, 683 (1912).

Prior to 1890, all government in Oklahoma was tribal government, and the tribes residing in Oklahoma enjoyed

the full cornucopia of powers possessed by Indian tribes generally. The beginning of non-tribal government in Oklahoma came in 1890 with the advent of the Territory of Oklahoma. The Oklahoma Organic Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890), contained a proviso of significance to the present case. Section 1, in pertinent part, states:

> Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make or enact if this Act had not been passed.

It is clear that the tribal governments that predated and preceded the creation of the Territory of Oklahoma were vested with exclusive civil jurisdiction over their territory including exclusive authority to levy and collect taxes. By enacting this proviso, the quoted section 1 of the Organic Act, Congress clearly intended to preserve exclusive federal and tribal jurisdiction undiminished by the creation of the new Territory, and later the new State.

The Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, in Section 1 continued these federal and tribal protections through the creation of the State. Section 1 provides:

> That the inhabitants of all that part of the area of the United States now constituting the Territory

> of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

Congress expressly reserved, in Section 1 of the Oklahoma Organic Act of May 2, 1890, 26 Stat. 81, and again in Section 1 of the Oklahoma Enabling Act of June 16, 1906, 34 Stat. 267, its complete and exclusive authority over the persons, property and other rights of Indians "by treaties, agreement, law or otherwise." Pursuant to these acts, Article 10, §6 of the Oklahoma Constitution exempts from state taxation:

> such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws

and Article 1, §3 thereof states in pertinent part:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

The intent of the Oklahoma Organic Act with respect to the Indian tribes, and therefore that of the Oklahoma Enabling Act which contains substantially the same language, is illustrated by an exchange between Congressmen Mansur and Turner during the floor debates. The purpose of the Oklahoma government vis-a-vis the Indian tribes and their territory was explained as follows:

> MR. MANSUR: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?
>
> MR. TURNER: But I suggest to the gentleman that this is no longer a reservation, but a Territory.
>
> MR. MANSUR: But I desire to remind the gentleman that, as this bill expressly declares, *this Territorial government or organization is not for any Indian reservation whatever; it does not apply to Indian reservations.*

51 Cong. Rec. 2104 (1890) (remarks of Mssrs. Mansur and Turner) (emphasis added). Perhaps in part because the allotment agreements were then being negotiated, Congressman Mansur emphasized that the Indian tribes and their reservations were to be unaffected by the creation of Oklahoma:

> I challenge any gentleman on this floor – I care not who he is – to take any one of the first twenty-four sections of this bill [the Sections relating to Oklahoma Territory] and show where

it touches a red man at all. I repeat, for I would like to have it understood, that the first twenty-four sections of this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first twenty-four sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation . . . .

Now, as to every Indian reservation within the whole limits of the Indian territory as now organized, we say expressly that those first twenty-four sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that as to every Indian tribe and as to the land of every Indian tribe, none of these twenty-four sections which apply to the white people shall operate.

Id. at 2176. Notwithstanding the claims of the Oklahoma Tax Commission to the contrary, it appears that the proponents of the bill to create Oklahoma did not think they had to destroy tribal government or Indian reservations in order to accomplish their purpose.

These provisions constitute specific federal statutes speaking directly to limitations on the jurisdiction of the State of Oklahoma in Indian matters. Moreover, this bar to state authority coincides with the creation of the jurisdictional competitor. From a reading of this statute, it can be said that the Territory and State have *ab initio* been preempted in this area.

In 1953, Congress enacted a special jurisdictional statute popularly known as Public Law 83-280. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified

as amended at 18 U.S.C. §1162, 25 U.S.C. §1321, 28 U.S.C. §1360). Public Law 83-280 authorizes States to assume civil and criminal jurisdiction over Indian Country within their boundaries. Essentially, P.L.-280 is a congressional prescription for the assumption of jurisdiction by the States over matters arising in Indian Country. The significance of P.L.-280 to our present case is that the Court in *Kennerly v. District Court,* 400 U.S. 423 (1971) found that this statute is a "governing Act of Congress" preempting State action in the absence of compliance with its provisions by the State. This ruling was followed in *McClanahan v. Arizona Tax Commission,* 411 U.S. 164, where the court noted that States must follow the congressional prescription and failure to do so results in an absence of State subject matter jurisdiction concerning matters affecting Indians which arise in the Indian Country. The court in both *Kennerly* and *McClanahan* found that neither Montana nor Arizona had taken the required affirmative action to assume the claimed jurisdiction. Likewise, Oklahoma has not acted pursuant to P.L.-280 to assume civil or criminal jurisdiction within Indian Country. Finding that under the Federal Law, Oklahoma had not acted to assume jurisdiction over the Indian Country within its borders, the court, in *United States v. Littlechief,* No. 76-207-D (W.D. Okla., Nov. 7, 1977) followed and reprinted in *State v. Littlechief,* 573 P.2d 263 (Okla. Crim. 1978), commented on the impact of P.L.-280 in Oklahoma in the following fashion:

> Under the Act of August 15, 1953, Public Law No. 83-280, 67 Stat. 588 (1953) (hereinafter Public Law 83-280), the Congress gave the States permission to assume criminal and civil jurisdiction over any "Indian Country" within their

borders without the consent of the tribe affected. Title IV of the Civil Rights Act of 1968, 25 U.S.C. §§1321-1326 (hereinafter Title IV), changed the procedure set out in Public Law 83-280 and required the consent of the Indians involved before a State was permitted to assume criminal and civil jurisdiction over "Indian country." See 25 U.S.C. §§1321(a) and 1322(a). Like Section 6, Public Law 83-280, 25 U.S.C. §1324 gave States with legal impediments to the assumption of jurisdiction under Title IV permission to amend their constitutions and statutes to remove any such impediments and provided that the assumption of jurisdiction by such a State should not be effective until the required amendments had been made. Article 1, Section 3 of the Oklahoma Constitution constitutes a legal impediment. See H.R.Rep. No. 848, 83d Cong. 1st Sess., reprinted in [1953] U.S. Code Cong. & Admin. News p. 2409. Under the provisions of Public Law 83-280 it appears therefore that the State of Oklahoma could have unilaterally assumed jurisdiction over any "Indian country" within its borders at any time between 1953 and 1968 had the Oklahoma Constitution been amended as required. After the enactment of Title IV in 1968 Oklahoma had to amend its constitution and the affected tribes had to consent to the State's assumption of jurisdiction over them before the State could acquire jurisdiction over "Indian country." *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Kennerly v. District Court*, 400 U.S. 423, 91 S. Ct. 480, 27 L.Ed.2d 507 (1971). However, the State of Oklahoma apparently has never acted pursuant to Public Law 83-280 or Title IV and assumed

jurisdiction over the "Indian Country" within its borders. *See Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 550 F.2d 442 (CA 1977) at note 3.

Oklahoma has not been granted, nor did it choose to assume civil jurisdiction over Indian Country either under the Act of August 15, 1953, or under Title IV of the Indian Civil Rights Act of 1968. Oklahoma has neither amended its constitution nor secured the consent of the Indians affected.[14] In the absence of compliance with 25 U.S.C. §1322(a), (P.L. 83-280, as amended), Oklahoma cannot exercise civil jurisdiction over Indians in the Indian Country.

The outgrowth of this summary review, is that clearly the *per se* rule of *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987) and *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985) prohibiting State taxation of Indians in Indian Country, remains applicable to Indian tribes in Oklahoma in general, and the Sac and Fox Nation in particular. The corollary to this rule is that the failure of the Oklahoma Tax Commission to plead and prove specific unambiguous congressional authority both to levy, and collect, the particular taxes at issue is fatal to

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[14] In *Ahboah v. Housing Authority of the Kiowa Tribe of Indians*, 660 P.2d 625 (Okla. 1983), the Oklahoma Supreme Court stated: "The Kiowa Tribe has not assented to the assumption of jurisdiction by the State of Oklahoma. Therefore Oklahoma to assume jurisdiction under Public Law 280 must have done so under the original 280 Act before the amendment by the Civil Rights Act of 1968." The Court went on to determine that the State of Oklahoma had not acquired jurisdiction pursuant to the original Public Law 280.

its cause. Simply stated, state authority to tax an Indian tribe or individual Indians within the Indian Country are completely preempted by federal law in the absence of Congressional action to the contrary.

B. THE SAC AND FOX TREATIES PRECLUDE STATE TAXATION WITHIN THE NATION'S INDIAN COUNTRY.

Articles 7, 9, 13, and 14 of the Sac and Fox Treaty At Fort Harmar, 7 Stat. 28 (1789), and its legislative history, C.A. App. Exh. 5, and the Treaty of August 19, 1825, 7 Stat. 272, effectively grant the Sac and Fox Nation exclusive jurisdiction over all persons who "settle upon their lands" thus leaving no room for state taxation of the income or property of persons within the jurisdictional Indian Country of the Nation. Article 7 of the Fort Harmar treaty states in pertinent part:

> Trade shall be opened with the said nations and they do hereby respectively engage to afford protection to the persons and property of such as may be duly licensed to reside among them for the purposes of trade, and to their agents, factors, and servants . . .

and at Article 9:

> If any person or persons, citizens or subjects of the United States, or any other person, not being an Indian, shall presume to settle upon the lands confirmed to the said nations, he and they shall be out of the protection of the United States; and the said nations may punish him, or them, in such manner as they see fit.

Other provisions of this treaty provided for extradition of Indians committing crimes outside the Indian Country and punishment of non-Indians committing crimes against Indians outside the Indian Country, Art. 5; mutual return of stolen horses, Art. 6; and mutual assistance in time of war, Art. 8.

The importance of these provisions is that they cut from the whole cloth the legal and political relationship between the Sac and Fox Nation and the United States, the basic terms of which have not been repealed or modified to date by the policy making branch of the Government. While the area of land occupied by the Sac and Fox Nation has been changed by a series of land transactions contained in their treaties, the terms under which that occupancy has been maintained have not changed – in direct contrast to the Cherokee involved in *Worcester v. Georgia*, 6 Pet. 515 (1832), for instance, whose similar treaty was abrogated after the Civil War.

In *Worcester*, supra, the Marshall Court determined that these types of treaty provisions left no room for State action, even with respect to non-Indians, within the Tribe's territory. The Treaty was entered into as one of the first acts of the new federal government under the Constitution in response to a diplomatic communication from the Tribes Northwest of the Ohio River and others dated December 13, 1786, requesting a meeting to resolve differences and disputes between the Tribes and the fledgling United States. C.A. App. Exh. 5, pp. 8-9. On July 20, 1787, Secretary of War Knox reported to Congress as follows:

> The design [of the communication] if so comprehensive and perplexing to the United States, as reasonably to excite a well grounded suspicion,

that it has been dictated by the subtle policy of the British chief, in Canada, for purposes that are yet to be developed. But, however this conjecture may be founded, or whatever may be the influence, or motives which effected the confederation, your Secretary apprehends, that it now has assumed a form, and power, which renders a war, or a treaty inevitable. A slight consideration of the subject will enable the mind to form a satisfactory result of the measure which ought to be pursued.

Independent of the general but strong principles of humanity which ever forbid a war for an object which may be obtained by peaceable and honorable means; it is to be apprehended that the finances of the United States are such at present as to render them utterly unable to maintain an Indian war with any dignity or prospect of success. . . .

> The invitation to the treaty is so artfully drawn that unless it be attended to by the United States, and a war should ensue, it will operate as a manifesto, by which it will appear that we preferred War to Peace. The appeal being made, the United States may have the verdict of mankind against them; for men are ever ready to espouse the cause of those who appear to be oppressed provided their interference may cost them nothing; but the consequence may fix a stain on the national reputation of America.

JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, Vol. XXXII 1789, pp. 388-389, C.A. App. Exh. 36.

Apparently, the Congress agreed with Secretary Knox, for the Treaty ensued pursuant to instructions to Arthur St. Clair, Governor of the Territory Northwest of the river Ohio

from Charles Thomson, Secretary of the Congress which specifically authorized the stipulation of Article 9 that "any white person going over the said boundary" may be "treated in such manner as the Indians shall think proper." C.A. App. Exh. 5, p. 9. The Sac and Fox Treaties, then, are even more explicit than the treaty at issue in *McClanahan*, supra. It is apparent that the Sac and Fox exerted such jurisdiction over non-Indians through the allotment period, C.A. App. Exhs. 34 (tax on licensed traders) and 35 pp. 11, 13, and this claim has been preserved throughout the history of the Sac and Fox – United States relationship to the present day. *See*, generally, C.A. App. Exh. 6. Therefore, it is clear that the attempts of the Oklahoma Tax Commission to levy and collect taxes within the Indian Country of the Sac and Fox Nation infringe on their treaty rights of self-government, are pre-empted by federal treaty and law, and cannot stand.

C. STATE TAXATION WITHIN THE SAC AND FOX INDIAN COUNTRY INFRINGES UPON THEIR RIGHT TO SELF-GOVERNMENT.

Respondent's primary position is that the Oklahoma Tax Commission, if it wishes to extend its laws into the Indian Country, should simply be required to comply with the Congressionally mandated procedure for the acquisition of such jurisdiction through P.L. 83-280, as amended, by seeking express legislative authority for its actions from its own State legislature insofar as non-tribal members are concerned, and be required to seek specific unambiguous legislation from Congress authorizing the application of its laws within the Indian Country insofar as Sac and Fox tribal members are concerned. In the alternative, Oklahoma cannot tax here absent a governing

Act of Congress because such taxes would infringe on tribal self-government. *Williams v. Lee*, 358 U.S. 217 (1959).[15]

Only Congress may regulate commerce with the Indian Tribes. U.S. Constitution, Art. I, Sec. 8, Cl. 3. To allow the State to unilaterally regulate commerce between Indians and members of the same or other Tribes, or non-Indians,[16] through taxation, licensing, or other means in the absence of Congressional consent is to read this Clause out of the Constitution, Federalist Papers No. 3, p.

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[15] Like the extinguishment of reservations, there is no doubt that Congress knows precisely how to grant States criminal and civil jurisdiction over the Indian Country and tribal members within that State's borders when it chooses to do so. 25 U.S.C. §232 (New York – Criminal Matters); 25 U.S.C. §233 (New York – Civil Matters); 18 U.S.C. §3243 (Kansas – Criminal Matters); 25 U.S.C. §1708 (Rhode Island – Civil and Criminal); 25 U.S.C. §1725 (Maine – Civil and Criminal); 25 U.S.C. §§1746, 1747 (Florida/Miccosukee Tribe – Civil and Criminal); 25 U.S.C. §1755 (Connecticut – Civil and Criminal); 25 U.S.C. §1771e (Massachusetts – Civil and Criminal).

[16] The Sac and Fox Nation understands that its cross-petition for a Writ of Certiorari was denied by this Court. However, given the statement in Rule 14.1(a) that "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein" the Nation is unsure as to whether it will be allowed to argue for reversal of the Tenth Circuit's ruling adverse to it as to members of other Tribes and non-Indians. The Nation will do so if given the opportunity as it does not wish to unintentionally concede this issue. However, the treaty provisions are the same whether one considers tribal members, other Indians (See, the references to the recent Congressional reversal of the recent Court ruling drawing distinctions between Indian set out in the Cross-Petition of the Nation in No. 92-499) and non-Indians.

43-44; No. 42, pp. 268-269 (C. Rossiter, Ed. 1961) (NAL Penguin, Inc., Pub.). Contrary to the Oklahoma Tax Commission's position, the rules for state taxation in the Indian Country are exactly the opposite of the normal taxation rules. As the Court stated in *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985):

> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we stated earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation; second, statutes are to be construed liberally in favor of the Indian, with ambiguous provisions interpreted to their benefit.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court recognized that the federal law imposed a *per se* rule prohibiting state taxation of Indian Tribes absent the express consent of Congress. The cases prohibiting state taxation of Indians within Indian Country in the absence of unmistakable authorization from Congress are legion. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *Moe v. Confederated Salis and Kootenai Tribes*, 425 U.S. 463 (1976); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980);

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

The Tenth Circuit ruled in this case "that direct state taxation of tribal property or the income of a tribal member earned solely on a reservation is *presumed* to be preempted, *absent express congressional authorization.*" (Emphasis added.) OTC Pet. Cert. at App. A-3. This is consistent with this Court's ruling in *McClanahan*, supra at 170-171:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by an act of Congress.

The income at issue in this case is earned within Indian Country working for the tribal government, where both the federal and tribal government's interest in establishing strong tribal governments is at its zenith and are *per se* preempted as an infringement or tribal self-government.

Petitioner, Oklahoma Tax Commission relies on *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). This case is inapplicable for several reasons. First, *Oklahoma Tax Commission v. United States* did not involve what was then perceived as an autonomous tribal government with a taxation system in place working toward less dependence upon outside sources and actively governing its territory. This case does. The *Oklahoma Tax Commission*

case dealt with the Five Civilized Tribes whose taxing powers and other significant powers of self-government had at that time been diminished by Act of Congress.[17] It has never been held that any governmental powers of the Sac and Fox Nation were abolished. In fact the Petitioner admits that the Sac and Fox may tax. Further, that case dealt, not with whether a State could extend its laws into the Indian Country *sans* Congressional consent, but with whether particular property made unrestricted and taxable by Act of Congress was to be considered as nontaxable after Congress simply reimposed restrictions against alienation *while providing for continued taxation of the property.* In the case at Bar, Congress has never authorized State taxation within the Sac and Fox Indian Country.

The Petitioner also argues that its tax should be allowed because it provides services to members off the Reservation. However, states may not tax personal property of tribal members located upon reservations even if the state had the duty and responsibility of providing criminal and civil jurisdiction for the reservation, *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which, in this case, it does not. It is difficult, to say the least, to be satisfied with the argument that a State which chooses *not* to follow the Congressionally mandated process for

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[17] As noted in *Board of County Comm'rs. of Creek Co. v. Seber*, 318 U.S. 705 (1943), Congress had authorized the Five Civilized Tribes to resume their former powers. The Muscogee (Creek) Nation has done so. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir., 1988).

obtaining civil jurisdiction within its borders may somehow claim even more authority over the persons and property within that Indian Country than a State which has followed the Congressional rules. Yet this is precisely the Oklahoma Tax Commission's argument.

The Petitioner continues to ignore the fact that the Sac and Fox Nation provides governmental services to its members and other residents of its jurisdiction while the State does not. Without any support in the record, it makes the unabashed claim that "Oklahoma has assumed the burdens of jurisdiction over the Indians in this state" Pet. Brf. On Merits at 13. If this is so, the State Courts and Federal Courts sitting in Oklahoma are certainly unaware of the situation. C.A. App. Exhs. 18, 27, 28, 29, 30, 31, 32, *United States v. Littlechief,* No. 76-207-D (W.D. Okla., Nov. 7, 1977) followed and reprinted in *State v. Littlechief,* 573 P.2d 263 (Okla. Crim. 1978) (murder case); *C.M.G. v. State,* 594 P.2d 798 (Okla. Crim. 1979) cert. den. 444 U.S. 992 (1979) (murder case); *Cheyenne-Arapaho Tribes v. Oklahoma,* 618 F.2d 665 (10th Cir. 1980) (hunting and fishing); *Ross v. Neff,* 905 F.2d 1349, 1352 (10th Cir. 1990), (county sheriff without authority to arrest Indian within Indian Country); *Housing Authority of the Seminole Nation v. Harjo,* 790 P.2d 1098 (Okla. 1990) (eviction); *Ahboah v. Housing Authority of the Kiowa Tribe,* 660 P.2d 625 (Okla. 1983).

Employment within Indian Country directly involves the Tribe through its inherent regulatory power over the work place, its form of government, and the federal policy of encouraging economic development within Indian Country. *See e.g.,* Indian Self-Determination Act, 25 U.S.C. §450a *et seq.* and Indian Finance Act, 25 U.S.C. §1451 *et seq.* In fact, the Sac and Fox Nation is one of the few

Tribes selected to participate in the Tribal Self-Governance Demonstration Project authorized by Congress, 25 U.S.C. §450f, Note, Section 209 of Pub.L. 100-472, as amended by Pub.L. 102-184, §§2 to 6, Dec. 4, 1991, 105 Stat. 1278. Members and non-members enjoy the protection of the laws, courts, police, and other Tribal services while within the Sac and Fox jurisdiction. C.A. App. Exhs. 3, 4, 44, 45, 46, 47, 48. There is nothing in the record which suggests that the State of Oklahoma offers governmental services for those individuals, members or not, within the Sac and Fox jurisdiction.

The federal government maintains Indian schools attended by Tribal members and other Indians, as well as programs that significantly compensate the states for educating Indian children residing on Indian lands for the very reason that the state cannot tax within Indian Country. *See,* 20 U.S.C. §238, Impact Aid and, 25 U.S.C. §§452-457, Johnson O'Malley programs. The State of Oklahoma has no legal duty to provide services to the Sac and Fox Nation's jurisdiction.

The Tax Commission appears to believe the transactions being taxed occur off Reservation. However, it should be very clear that the transactions attempting to be taxed by the State arise on Tribal lands. When a person is employed, and work is done within Sac and Fox lands, or cars are garaged within the Nation's jurisdiction and those actions are taxed by the State, then Tribal self-government is infringed by the State. The State taxes concerning both income and the motor vehicle personal property tax are not solely directed at building roads or schools. The taxes involved herein are used by Oklahoma for various governmental functions.

The key factor involves interference with tribal self-government. The Commission incorrectly states the lesson of *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 100 S.Ct. 2069 (1980). *Colville* is not based on geography. *Colville* says that tribal sovereignty does not allow marketing tax exemptions by importing goods into Indian Country and reselling them for immediate export to outside the Indian Country. It further states that motor vehicles are not taxable by the state even though they are driven on state roads because it is the value of the vehicle which is being taxed.

The cars of people living within the Sac and Fox jurisdiction are not principally garaged there to avoid state taxes. People are not working for the Sac and Fox Nation to avoid state taxes. It could, in fact, be that such employees would make better salaries working for the State of Oklahoma. The member and non-member in the case at bar work and earn income in Indian Country at jobs which would not exist but for the daily involvement and participation of the Nation, and the reservation economy.

Going off reservation after work does not mean that the value of their labor was generated off reservation. If income which is earned from activity carried out in the Indian Country is taxable, the effects on a tribe's ability to self-govern would be disastrous. Likewise, the inability to freely tax personal property owned by members and non-members living on the reservation would have detrimental effects upon tribal governments. Tribal governments would not have a sufficient tax base to be able

to effectively serve people living within their jurisdictions, and would be doomed to depend upon federal authorities to provide services to members.

The power of taxation is used for many other purposes than simply raising revenue. It is also used to encourage or discourage certain conduct, or to regulate certain conduct. Ultimately allowing unilateral assumption of the authority to tax and regulate activity, conduct, and property in the Indian Country means that the Nation's federally protected right to self-government is defeasible by the State, or can only be exercised at the sufferance of the State. Such a result is clearly contrary to both the letter of the Constitution, treaties, and statutes, and the current policies of Congress. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Iowa Mutual Ins. Co. v. LaPlante*, 107 S.Ct. 971 (1987); *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852 (1985).

CONCLUSION

For the foregoing reasons, the Court should rule that persons working and owning vehicles garaged within the Sac and Fox Indian Country, including its 1867 Reservation, are not liable for the State taxes at issue herein. All of which is

Respectfully submitted,

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No. 92-259

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Supreme Court of the United States

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OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF ON THE MERITS BY PETITIONER

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REPLY BRIEF ON THE MERITS BY PETITIONER

I. THE RETRIAL OF THIS CASE AS URGED BY THE BRIEF OF THE SOLICITOR GENERAL IS NOT NECESSARY TO DETERMINE THE RIGHTS OF THE LITIGANTS.

In reply to the Brief of the Solicitor General on behalf of the United States as Amicus Curiae, the Oklahoma Tax Commission disagrees that this case should be retried in the District Court and opposes the suggestion made by the Solicitor General.

In part IIA, page 20, of the Solicitor's brief, the government argues that although the relevant federal statute, i.e. ***Sac and Fox Allotment Agreement of February 13,***

1891, 26 Stat. 749, did extinguish the Sac and Fox Reservation, a determination still needs to be made as to whether this case involves a "reservation community."

The concept of a possible "reservation community" is much too amorphous to prove up in an evidentiary hearing. This concept is not provable by hard evidence but would most likely be the subject of opinion testimony in a battle of expert witnesses. No doubt the record in this case would be bursting at the seams, but these "facts" would not advance our understanding of this case. The record in this case is clear enough on the point that Congress disestablished the Sac and Fox Reservation and opened the area for white settlement. These points are documented in the statutes and case law cited in the Commission's brief in chief in Section I.A of the argument dealing with the disestablishment of reservations in Oklahoma. The Solicitor's brief also points out in footnote 9 at page 12 that census data for the tribal membership and the affected counties is readily available to demonstrate that the Sac and Fox membership comprise less than 2% of the population in that area.

The authorities cited by the Commission are inconsistent with a theory that Congress intended to create, develop, maintain and perpetuate a "reservation community" for this Tribe within Oklahoma. The determination is a question of law to be based on the construction or interpretation of relevant federal statutes and is not a question of fact to be developed by testimony in an evidentiary hearing.

In Section II.B, pg. 22-23, of the Solicitor's brief, the United States is critical of the litigants' use of motions for

Summary Judgment in the trial of this case. The Commission submits that Summary Judgment is the appropriate method for this case. The essential facts are that the tribal government employs both members and nonmembers to work at the tribal headquarters on Indian Country. Some of these tribal employees live on Indian Country and some do not. The question is, given the action of Congress to disestablish the reservation, do these people owe state taxes. This question is answerable by the application of legal principles of Indian law developed by this Court in previous cases. It would not illuminate this inquiry to prepare an inventory listing of legal descriptions of the various tracts of Indian Country involved nor to introduce the testimony of all tribal employees as to their membership status, where they work, where they live and other personal information. This information would quickly become obsolete when, during the course of litigation, the employees move or change employment and would add a layer of complexity to a complex case. The legal complexity requires factual simplicity in this case.

The Solicitor urges further factual development in this case to determine the pre-emption issue by entering a particularized inquiry into the nature of the state, federal and tribal interests at stake. The Solicitor has an entirely different perspective of this case from that of the actual litigants. The United States has just recently entered the case at this level. The interest of the United States in this case, as stated on page 1 of its brief, is in the development of sound legal principles. However, the parties in this case have been litigating these issues for several years. The Commission and the Tribe brought this case to determine the rights and obligations of their citizens in a

dispute over money. The rights of the parties can be and deserve to be determined based upon the record presented. Furthermore, the people who will be responsible for any resulting tax liability are anxious to see a resolution of this case for their own personal tax planning. It would not serve anyone's purpose to remand this case merely to fine tune the evidence. Rather than remand, this case should be resolved.

In respect to whether a reservation community exists in Oklahoma, the Supreme Court has previously characterized this situation in ***Oklahoma Tax Commission v. United States***, 319 U.S. 598, at 603 (1943) as follows:

> The underlying principles on which these [reservation] decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in ***Worcester v. Georgia***, supra [6 Pet. 515]; and unlike the Indians involved in the ***Kansas Indians*** case, supra [5 Wall. 737] they are actually citizens of the State with little to distinguish them from all other citizens . . .

II. THE STATE INCOME TAX AS APPLIED TO TRIBAL MEMBERS DOES NOT INFRINGE TRIBAL SELF-GOVERNMENT.

The Solicitor's brief proposed that apart from the "reservation community" problem, the income tax could be barred in that the tax directly burdens the administration of the Tribe by increasing the cost of administering tribal affairs in areas subject to its jurisdiction.

This case is different from ***McClanahan v. Arizona Tax Commission***, 411 U.S. 164 (1973) in that the Arizona income tax was inapplicable because the ***Navajo Treaty***, 15 Stat. 667, was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. The **Sac and Fox Allotment Agreement** was meant to disestablish the lands as within exclusive tribal sovereignty. Therefore, the Solicitor is presenting an alternative in the form of intergovernmental immunity. This Court ruled in ***McClanahan*** at 411 U.S. 169-170 that to the extent that the tax exemption rests on federal immunity from state taxation, it may well be inapplicable in a case such as this involving an individual income tax.

The intergovernmental immunity doctrine has been rejected in this context in ***Mescalero Apache Tribe v. Jones***, 411 U.S. 145 (1973) and ***Oklahoma Tax Commission v. Texas Co.***, 336 U.S. 342 (1949), where the Court ruled that so far as concerns private persons claiming immunity for their ordinary business operations, even though in connection with governmental activities, no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain the exemption. The taxes here are nondiscriminatory. The tribal employees are private persons who seek immunity for their income because they are engaged in tribal employment.

The reasoning that the taxation of a government employee interfered with the activities of the government was renounced in ***Graves v. People of the State of New York***, 306 U.S. 466 (1939) where the Supreme Court considered that the expansion of the immunity of the one

government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. The burden of an income tax on government employees as may be passed on to the government through increased price of labor is the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other.

Immunity may not be conferred simply because the tax has an effect on the government or even because the government shoulders the entire economic levy. What the Court's cases leave room for is the conclusion that tax immunity is appropriate in only one circumstance, when the levy falls on the government itself, or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned, ***United States v. New Mexico***, 455 U.S. 720 (1982). In this case the income tax falls entirely on the individual employee and the Tribe has no responsibility toward state law to withhold, report or pay over any amounts or perform any duties.

In reply to the infringement issues raised in the brief of the Sac and Fox Nation, the Tribes primary trust is that the old treaties of ***Fort Harmar***, 7 Stat. 28 (1789) and of August 19, 1825, 7 Stat. 272, effectively grant the Sac and Fox Nation exclusive jurisdiction over all persons who "settle upon their lands" thus leaving no room for state taxation. These treaties were made when the Tribe inhabited lands in other states and involved circumstances much different than those we deal with today. Those treaties did not contemplate the Tribe's current situation and by no means were those treaties the final word from Congress regarding the Sac and Fox. The treaty of 1789 was consummated before the United States had eve.. acquired the territory encompassing the State of Oklahoma in the Louisiana Purchase of 1803. Both treaties preceded the Tribe's removal to Indian Territory (1867), the disestablishment and opening of the Tribe's Reservation (1891) and Oklahoma Statehood (1907). The old treaties cited by the Tribe were abrogated by Congress and are of no use to this Court for the purpose of determining the rights of the parties in this case.

Finally, the Tribe argues that if tribal members are liable for state taxes, the effects on a tribe's ability to govern itself would be disastrous. However, the Tribe does not explain specifically how a tribal government will fail because a tribal member has to buy a state license plate for his or her car or pay income taxes to the state. There are forty different tribes in this state and those tribes all have existing governments. Many tribes are facing a variety of governmental problems but none of those problems can be traced to a tribal member's payment of state taxes, and no tribal governments have

expired due to that reason. If this Tribe is experiencing governmental difficulties, it would be more fruitful to look other than at the Commission for the root causes.

CONCLUSION

For the reasons stated in its briefs to this Court, the Oklahoma Tax Commission respectfully requests this Court to reverse the judgment of the United States Court of Appeals as to the issues presented in the Petition in this case.

February, 1993.

Respectfully submitted,

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No. 92-259

In the Supreme Court of the United States

OCTOBER TERM, 1992

OKLAHOMA TAX COMMISSION, PETITIONER

v.

SAC AND FOX NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether and to what extent the Sac and Fox Reservation was diminished by the 1890 allotment agreement covering that Reservation.

2. Whether federal law permits Oklahoma to impose income taxes on income earned by members of the respondent Tribe in connection with their employment by the Tribe on land held in trust for the Tribe or its members.

3. Whether federal law permits Oklahoma to impose motor vehicle excise taxes and registration fees on automobiles owned by members of the respondent Tribe who live on allotted parcels held in trust for them by the United States.

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INTEREST OF THE UNITED STATES

This case concerns the taxing authority of the State of Oklahoma over members of the Sac and Fox Nation in Oklahoma. Because the United States has a special relationship with the Sac and Fox Nation and other Indian tribes and holds the land at issue in trust, it has an interest in the development of sound taxing principles in this setting.

STATEMENT

1. In 1867, a 480,000-acre reservation was established within the boundaries of what is now the State of Oklahoma for the Sac and Fox Nation of Indians (hereinafter "the Tribe"). 15 Stat. 495. In 1890, the Tribe executed an allotment agreement with com-

missioners appointed by the United States. Article I provided that the Tribe "hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to" a described tract of land, which covered all of the Reservation. 26 Stat. 750. The only exceptions to that cession were for a 160-acre parcel where the Sac and Fox Agency was located, and a nearby 640-acre parcel set aside for a school and farm. *Id.* at 750-751. Article II provided that, as consideration for the cession, each member of the Tribe was entitled to select an allotment of 160 acres of land, which would be held by the United States in trust in accordance with Article III of the agreement. *Id.* at 751-752. As further consideration, the United States agreed under Article IV to pay the Tribe the sum of $485,000, subject to a downward adjustment of $200 ($1.25 per acre) for each allotment in excess of 528. *Id.* at 752. Under Article V of the agreement, the remaining lands would "become public lands of the United States, and * * * be subject to white settlement." *Id.* at 753. Congress ratified the agreement in 1891, *id.* at 758, and the Presidential proclamation opening the lands to entry was made later that same year, 27 Stat. 989. Today, the United States owns approximately 1,000 acres in trust for the Tribe (which include the 800 acres withheld from the 1890 cession) and approximately 15,000 acres of land in trust for members of the Tribe. C.A. App. Exh. 13.

2. This case involves two types of taxes imposed by the State of Oklahoma. First, 68 Okla. Stat. Ann. § 2355 (West 1992) imposes a tax "upon the Oklahoma taxable income of every resident or nonresident

individual." The Tribe also imposes an income tax on all of its employees, both members and nonmembers. Pet. App. A3. Although the state tax code provides for a credit for "the amount of tax paid another state by a resident individual * * * upon income received as compensation for personal services in such other state," 68 Okla. Stat. Ann. § 2357.B.1 (West 1992), there is no provision for a credit for income taxes paid to the Tribe.

The second state tax scheme at issue here imposes motor vehicle excise taxes and registration fees. The excise tax is imposed at a rate of 3¼% on "the transfer of legal ownership of any vehicle registered in this state and upon the use of any vehicle registered in this state." 68 Okla. Stat. Ann. § 2103 (West 1992).[1] The annual vehicle registration fees consist of a $15 registration fee and a fee of 1¼% of the vehicle's value. 47 Okla. Stat. Ann. § 1132.A (West Supp. 1992). State law provides an exception from those taxes for a "visiting nonresident"; such an individual need not register his vehicle if it is properly registered in his native State and does not remain "for any period in excess of 60 days." 47 Okla. Stat. Ann. § 1125.C (West Supp. 1992). That exception does not apply to vehicles registered with

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[1] Although that provision standing alone taxes only vehicles registered in the State, it effectively imposes a tax on all vehicles used in the State, because 47 Okla. Stat. Ann. § 1105.B (West Supp. 1992) requires the "owner of every vehicle in this state * * * [to] possess a certificate of title as proof of ownership," and 47 Okla. Stat. Ann. § 1112 (West Supp. 1992) provides that "[e]very owner of a vehicle possessing a certificate of title shall, before using the same in this state, make an application for the registration of such vehicle with a motor license agent."

the Tribe, which taxes the ownership of vehicles principally garaged on lands subject to its jurisdiction. Pet. App. A3.

3. The Tribe filed suit against the Oklahoma Tax Commission in the United States District Court for the Western District of Oklahoma, arguing that it was unlawful for the Commission to impose the income taxes described above on individuals employed by the Tribe[2] or to impose the above-described motor vehicle taxes on persons who previously had registered their vehicles with the Tribe.[3] On cross-motions for summary judgment, the district court granted partial summary judgment in favor of each party. Pet. App. A9-A13. Although the parties extensively briefed the question whether the 1867 Sac and Fox Reservation had been disestablished by implementation of the 1890 Sac and Fox Allotment Agreement (J.A. 29-39, 45-49), the district court found it unnecessary to reach that question. Instead, it relied on the statement of this Court in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991), that an area

[2] The Tribe's complaint also appears to have alleged (at ¶ 33) that the State may not tax the income of any resident of the Sac and Fox Reservation. As it comes to this Court, however, the case is limited to taxation of tribal employees.

[3] Although Oklahoma police for some period of time apparently issued criminal traffic citations charging individuals with driving an unregistered vehicle when their vehicle had been registered with the Tribe, the predominant way of collecting the motor vehicle taxes appears to have been a refusal to issue new titles to purchasers of such vehicles until the back taxes and fees were paid. See Cross-Petition for Writ of Certiorari, at 9-10, *Oklahoma Tax Commission* v. *Sac and Fox Nation*, cert. denied, No. 92-499 (Nov. 9, 1992).

"validly set apart for the use of the Indians as such, under the supervision of the Government * * * qualifies as a reservation for tribal immunity purposes." Pet. App. A11. Treating the parcels held in trust for individual tribal members as a reservation under that rationale, the district court concluded that *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), bars the Commission from taxing the income of tribal members derived from tribal employment on trust land, but permits it to tax the income of nonmembers. Pet. App. A11-A12.[4] Turning to the motor vehicle taxes, the district court held that *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), bars petitioner from assessing an unprorated use tax on automobiles owned by tribal members and garaged on trust land, but allows petitioner to tax automobiles owned by nonmembers. Pet. App. A12-A13.[5]

4. Both parties appealed, and the Tenth Circuit affirmed. Pet. App. A1-A8. The court of appeals began by relying upon the *Citizen Band Potawatomi* case for the premise that all trust land set apart for Indians under government supervision has the status of a reservation for tribal immunity purposes. Pet. App. A3-A4. The court then held that, under *McClanahan*, state taxes may not be imposed on income

[4] In an opinion denying the parties' motions to reconsider its judgment, the court explained that all tribal employees who are members of the Tribe are exempt from state taxation, whether or not they live on a reservation or trust land. Pet. App. A16.

[5] In its opinion on reconsideration, the district court declined to determine whether petitioner could impose a prorated tax, because petitioner had not presented that question to the court. *Id.* at A17.

earned by tribal members whose income is derived from "tribal sources" on "tribal land." *Id.* at A5. The court rejected the proposition that the immunity recognized in *McClanahan* is limited to Indians who reside on the reservation (or here, on tribal trust lands). *Id.* at A4 n.3. The court did conclude, however, that petitioner lawfully could tax income earned by nonmembers. *Id.* at A5-A6.

The court of appeals also affirmed the district court's rulings with respect to the motor vehicle taxes. Pet. App. A6-A8. In its view, *Colville* and *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), establish that "a state may not require a tribal member residing on tribal lands to pay state motor vehicle taxes, whether in the nature of property or excise taxes." Pet. App. A7. The court also noted that the Commission had offered no evidence to show that the registration fees are tailored to the use of the vehicles "outside Indian country." *Ibid.* With respect to nonmembers, however, the court concluded that petitioner was free to impose its taxes. *Id.* at A7-A8.

5. Both parties filed petitions for certiorari. On November 9, 1992, the Court granted the petition of the Oklahoma Tax Commission in No. 92-259, and denied the cross-petition filed by the Tribe in No. 92-499.

SUMMARY OF ARGUMENT

1. Respondent's reservation was diminished by the 1890 allotment agreement. This Court's decision in *Solem* v. *Bartlett*, 465 U.S. 463, 470-471 (1984), establishes an "almost insurmountable presumption" that a reservation has been diminished when Congress enacts a statute containing two features: language

that explicitly refers to cession or otherwise evidences the present and total surrender of all tribal interests; and an unconditional commitment by Congress to compensate the Indian tribe for the ceded land. The allotment agreement at issue in this case ceded all but 800 acres of respondent's earlier Reservation, and reflected compensation by Congress for the ceded land. Accordingly, respondent's formal Reservation was diminished by that agreement to the remaining 800 acres.

2. The lower courts concluded that petitioner could not apply its income tax to income earned by tribal members from activities on land held in trust for the Tribe or its members, based on the view that such land is functionally equivalent to a reservation in all respects. That conclusion is incorrect. The rule prohibiting State taxation of income earned on a reservation by reservation Indians rests on the long-standing notion that Indian tribes are not generally subject to a State's jurisdiction. That notion does not generally apply to individual Indians who do not live on a reservation or as part of a reservation community. Because both of the lower courts proceeded on the assumption that income tribal members earn on lands held in trust for the Tribe or its members is automatically exempt from state income taxation, they did not consider whether the members of the Tribe reside and work in a coherent reservation community. Accordingly, the case should be remanded to the district court for consideration of that question.

Additionally, the tax might infringe on "the right of reservation Indians to make their own laws and be ruled by them." See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980) (quoting

Williams v. *Lee*, 358 U.S. 217, 220 (1959)). Because the tax in this case is imposed on income the respondent Tribe pays its members in compensation for administering respondent's affairs, the tax infringes on that right. Because the permissibility of such an infringement turns on a particularized inquiry into the nature of the state, federal, and tribal interests at stake, and because the record does not contain the information necessary to conduct such an inquiry, the case should be remanded to the district court to allow it to consider that question as well.

3. The lower courts erred in invalidating the motor vehicle taxes imposed by petitioner. The basis for the lower courts' conclusion was their view that parcels of land allotted to respondent's members in 1890 necessarily have the status of a reservation for all purposes. As discussed above, that view is incorrect. At least under the historical circumstances of cession and allotment involved in this case, the individual trust allotments do not retain reservation status for purposes of evaluating petitioner's taxing jurisdiction over tribal members. Because respondent's formal Reservation is limited to the 800 acres excepted from the 1890 allotment agreement (together with any subsequently acquired parcels), the income of members of the Tribe who live outside that reservation is subject to petitioner's taxing jurisdiction, unless they reside in a reservation community. As discussed above, the lower courts have not yet considered that question. Accordingly, this aspect of the judgment of the court of appeals should also be vacated and the case should be remanded to the district court to allow it to consider that question.

ARGUMENT

I. THE ALLOTMENT AGREEMENT OF 1890 DIVESTED RESPONDENT OF ALL OF ITS RESERVATION EXCEPT FOR THE PARCELS NOT CEDED BY THE AGREEMENT

Respondent argued in the lower courts that the 1890 allotment agreement did not diminish the Tribe's 480,000-acre Reservation. Resp. C.A. Br. 5-12. We disagree, and believe that the only "reservation," in the formal sense, that remained after ratification of the 1890 agreement was the 800 acres of the earlier Reservation that were not ceded by the 1890 agreement.[6]

The courts below declined to resolve the question of the status of the 1867 Reservation. They found that issue to be irrelevant, because, in their view, all lands held in trust for the Tribe or its members must be treated as a reservation for the purpose of determining the scope of immunity from state law. See Pet. App. A4 n.2, A15. That was error. In our view, trust allotments that are not within the boundaries of an Indian reservation should not necessarily be treated as the functional equivalent of a reservation for all purposes. The courts below therefore should have addressed at the outset whether the Tribe's 1867 Reservation was diminished by the 1890 allotment agreement and, if so, to what extent. The Court might choose to remand for resolution of that issue before addressing the remaining issues in the case. But if the Court chooses to resolve the diminishment issue itself, it should hold that all lands

[6] Other lands that subsequently were acquired and are held by the United States in trust for the Tribe also may be treated as the functional equivalent of a reservation, at least for some purposes. See *Citizen Band Potawatomi*, 111 S. Ct. at 910-911.

ceded by the Tribe in 1890 (including the allotted parcels) were removed from the Reservation.

A. The Allotment Agreement of 1890 Diminished the Sac and Fox Reservation

This Court's unanimous decision in *Solem* v. *Bartlett*, 465 U.S. 463 (1984), summarizes the appropriate principles to apply in determining whether a reservation has been diminished or disestablished. The "first and governing principle is that only Congress can divest a reservation of its lands and diminish its boundaries." *Bartlett*, 465 U.S. at 470. Hence, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Ibid.* Naturally, "[t]he most probative evidence of congressional intent is the statutory language used to open the Indian lands." *Ibid.* On that question, language that explicitly refers to a "cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" strongly suggests that Congress meant to sever it from the reservation. Finally, "[w]hen * * * language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* at 470-471. By contrast, an act that opens surplus lands for non-Indian settlement, with the proceeds of land sales to be held in trust for the Tribe, is interpreted as leaving the reservation boundaries intact. See *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962).

Application of those principles to this case strongly suggests that the only formal reservation remaining to respondent after implementation of the 1890 agreement is the 800 acres excepted from the cession of lands made under the allotment agreement. First, the 1890 allotment agreement required respondent to relinquish all lands within the boundaries of the 1867 Reservation (except for the two defined parcels totalling 800 acres), using unmistakable language of cession: "The said the Sac and Fox Nation hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to [a particularly described parcel of land]." 26 Stat. 750.[7] Second, the agreement contained an unconditional promise by Congress to compensate respondent for the land opened to settlement: under Article II, the allotments to tribal members of parcels within the ceded tract constituted partial consideration to the Tribe for the cession; and Article IV required the United States to pay respondent $485,000 "[a]s a further and only additional consideration for the cession, conveyance, transfer, surrender and relinquishment of all title, claim and interest in and to the tract of land described in Article I hereof." 26 Stat. 752.[8] Accordingly, respondent is subject to the

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[7] See also Article II, 26 Stat. 751 (referring to "the cession, conveyance, transfer, surrender and relinquishment by said Sac and Fox Nation of all of their title, claim and interest, of every kind and character in and to the [parcel described in Article I]"); Article IV, 26 Stat. 752 (same).

[8] The amount of the compensation was subject to a downward adjustment if more than 528 members of the respondent tribe selected allotments, but we do not believe that renders the promise to pay sufficiently conditional to remove it from the principles described in *Bartlett*. Because there were 548

"almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Bartlett*, 465 U.S. at 470-471. We are aware of nothing that would support rejection of that presumption in this case.[9] Indeed, the Interior Department has formally determined that the ceded lands, including the allotments, ceased to be a "reservation," within the meaning of the federal statutes governing rights of way on reservations. *Status of Allotted Lands of Tribes Organized under Oklahoma Indian Welfare Act*, 59 Interior Dec. 1 (1945). Accordingly, the Court should conclude that the 1890 allotment agreement diminished the Reservation for present purposes as well.

B. The Allotment Agreement of 1890 Removed the Allotted Parcels from the Sac and Fox Reservation

As for the extent of the diminishment, the analysis applied by the Court in *Bartlett* suggests that the only formal reservation remaining to respondent is the 800 acres of the former reservation not included

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allottees rather than 528, see *Sac and Fox Tribe of Indians* v. *United States*, 340 F.2d 368, 369 (Ct. Cl. 1964); C.A. App. Exh. 15, such an adjustment apparently was made.

[9] The vast majority of the population in the area formerly covered by the reservation apparently are not members of the Tribe. See *Indian Reservations: A State and Federal Handbook* 238-239 (Confederation of American Indians 1986) (stating that respondent had 2,145 members as of 1984); Rand McNally, *Commercial Atlas and Marketing Guide* 456 (15th ed. 1984) (total 1980 population of 144,275 in the three counties in which the reservation formerly was located). Compare *Bartlett*, 465 U.S. at 480 (supporting holding that reservation had not been diminished by noting that areas opened to settlement were not predominantly occupied by white settlers).

in the cession made by Article I of that agreement. To be sure, the Court in *Bartlett* suggested that the diminishment of a reservation inferred from an agreement ceding lands would extend only to "unallotted opened lands," 465 U.S. at 470. But the logic of *Bartlett* is that a statement of cession of certain lands, coupled with compensation for those lands, supports the inference that Congress intended to diminish the reservation; if those features of a statute are adequate to establish diminishment, that also should be adequate to establish the extent of the diminution. Significantly, in this case the cession included not only the lands opened to white settlement, but also the lands on which allotments were made to members of the respondent Tribe. See Article II, 26 Stat. 751 (respondent's members were entitled to select allotments "in the tract of country hereinbefore described"); see also Article V, 26 Stat. 753 (opening to white settlement the "residue of said tract of country" remaining after allotments were made). Moreover, the compensation to respondent was paid in consideration for its cession of rights with respect to the whole parcel ceded by respondent, not just the portion opened to white settlement, and indeed the allotments to tribal members constituted partial consideration for the cession of the entire tract. See Art. II (allotments were made "[i]n consideration of the cession * * * of all of their title, claim and interest * * * to the lands described in the preceding Article"); Art. IV, 26 Stat. 752 (payment was "a further and only additional consideration for the cession * * * of all title, claim and interest in and to the tract of land

described in Article I hereof").[10] Accordingly, if the Court resolves the question, it should hold that the allotment agreement of 1890 removed the allotted parcels, as well as the land opened to settlement, from the formal Sac and Fox reservation.[11] See *United States* v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 216 (1943) (holding that allotments created by an allotment agreement with the Kickapoo Tribe substantively identical to the Sac and Fox agreement at issue here were no longer a portion of a "reservation" for right-of-way purposes).[12]

[10] The statement in *Bartlett* suggesting that disestablishment in some cases might be limited to unallotted lands is readily explained by the fact that the agreement in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975)—on which the *Bartlett* Court relied as support for the comment in question, see 465 U.S. at 470—ceded only "unallotted lands," see *DeCoteau*, 420 U.S. at 445.

[11] Although the terms of the allotment agreement and the General Allotment Act of 1887 grant certain specified statutory protections to allotted parcels and those who received allotments, those specific protections do not, in themselves, afford tribal members an exemption from the state taxes that the Tribe challenges. First, the requirement in the allotment agreement that the United States convey fee title at the end of the trust period "free of all incumbrances," 26 Stat. 751, parallels language in the General Allotment Act requiring that title be conveyed "free of all charge or incumbrance whatsoever," 25 U.S.C. 348. That language has been interpreted to prohibit a tax on income derived from the allotment before the fee patent is issued to the Indian owner, on the theory that such a tax effectively would encumber the allotment during the trust period. *Squire* v. *Capoeman*, 351 U.S. 1, 6-10 (1956); cf. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 158-159 (1973) (tax exception for Indian trust land extends to property "permanently attached to the realty"). The exemption does not extend, however, to income that is not "derived directly" from the corpus of the trust. See *Capoeman*, 351 U.S. at 9 (discussing *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418 (1935), which permitted a tax on income earned by investment of the proceeds of an allotted parcel). Because the income at issue in this case is earned by personal services of the individuals, it is not derived directly from the allotted parcels. It follows that a tax on that income would not encumber the allotted parcel, even if the services are performed on the parcel or the wage-earner resides on the parcel.

A proviso added to the General Allotment Act by the Burke Act in 1906 also provides that "all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States." Act of May 8, 1906, ch. 2348, 34 Stat. 183 (codified at 25 U.S.C. 349). It is not clear, however, that the proviso applies to the Sac and Fox Nation, because the General Allotment Act, as originally enacted in 1887, did not apply to it. See Act of Feb. 8, 1887, ch. 119, § 8, 24 Stat. 391 (codified at 25 U.S.C. 339). On the other hand, the Burke Act provision in question states that it "shall not extend to any Indians in the former Indian territory," 25 U.S.C. 349. At that time, the Sac and Fox Nation was located in the Oklahoma Territory, not the Indian Territory. See Act of Feb. 13, 1891, ch. 165, 26 Stat. 749 (preamble to Act approving allotment agreement of 1890, referring to respondent as "occupying a reservation in the Territory of Oklahoma"). Because a strong argument could be made that the pertinent exclusion in determining the scope of the 1906 Act is the one set forth in the 1906 Act, the Burke Act proviso arguably protects Sac and Fox allottees. In any event, respondent did not rely on those provisions in the court of appeals or in its brief in opposition in this Court. Accordingly, the Court need not resolve the issue in this case.

[12] As mentioned above, the Interior Department has applied the *Oklahoma Gas* ruling to deny reservation status to allotments made pursuant to the Sac and Fox agreement. *Status of Allotted Lands of Tribes Organized under the Oklahoma Indian Welfare Act*, 59 Interior Dec. 1 (1945).

II. FEDERAL LAW DOES NOT PERMIT THE STATES TO TAX INCOME IF IT IS EARNED FROM RESERVATION ACTIVITIES BY A RESIDENT OF THE RESERVATION COMMUNITY OR IF IT IS PAID BY THE TRIBE TO TRIBAL MEMBERS FOR PERFORMING SERVICES ASSOCIATED WITH THE ADMINISTRATION OF TRIBAL AFFAIRS

A. *McClanahan* v. *Arizona State Tax Commission* Bars States from Taxing Indian Income Only if It Is Earned by Indians Who Live and Work in a Reservation Community

Both of the lower courts concluded that the income tax at issue in this case was barred by the analysis in this Court's opinions in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905 (1991), and *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973). In *Potawatomi*, the Court considered whether an Indian tribe had sovereign immunity from suit in connection with activities in which it engaged on land that was held in trust for the tribe by the United States. In the course of concluding that the tribe did have sovereign immunity, the Court stated that the trust land "qualifies as a reservation for tribal immunity purposes." 111 S. Ct. at 910. In *McClanahan*, the Court held that federal law preempted a state income tax imposed on the income earned from activities on the Navajo Reservation by a Navajo Indian who resided on that Reservation. 411 U.S. at 165, 179-180. Reading *Potawatomi* and *McClanahan* together, the court of appeals in this case concluded that the income tax at issue here was invalid because it applied to tribal members who provided services on "tribal lands," a term that the court apparently used to refer to lands held in trust for the Tribe or its members, see Pet. App. A5. The court of appeals read *McClanahan* too broadly.

The rationale of *McClanahan* was that income earned on the Navajo Reservation by a tribal member residing and working on the Reservation did not fall within the state's taxing jurisdiction.[13] By contrast, the decision of the court of appeals rests on the premise that petitioner cannot tax income earned by tribal members for services rendered to the Tribe on land held by the United States in trust for the Tribe or its members, without regard to residency of the individual employees. Although the trust allotments constitute "Indian country" for purposes of 18 U.S.C. 1151(a) and (c),[14] and thus are subject to federal criminal jurisdiction under 18 U.S.C. 1152 and 1153, it does not necessarily follow that individual allotments are to be considered a reservation in all respects, and that residency of a tribal member on an allotment outside the reservation is enough to give a tribal member the benefit of *McClanahan*. Thus, unlike the undiminished formal reservation land at issue in *McClanahan*, the allotted lands at issue here do not have a character such that activities or residence on them automatically places a tribal employee beyond the reach of the State's taxing juris-

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[13] See, *e.g.*, 411 U.S. at 168 (noting that "[i]t followed from th[e] concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries"); *id.* at 175 ("[T]his Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation.").

[14] 18 U.S.C. 1151(c) extends the definition of "Indian country" to include "all Indian allotments, the Indian titles to which have not been extinguished."

diction. See, *e.g.*, *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148-149 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). Hence, the appropriate inquiry is whether the allotted trust lands and tribal members who live on them properly should be considered part of a reservation community.

Nothing in *Potawatomi* should be read to alter this conclusion, and rigidly to require that trust allotments be treated categorically the same as a reservation. The land at issue in *Potawatomi* was owned in trust for the tribe itself; it was not an allotment held in trust for an individual Indian. Moreover, *Potawatomi* involved the sovereign immunity of the tribe itself, not the immunity of persons who simply deal with the tribe. It is one thing to say that States can tax individuals who receive money from an Indian tribe; it is quite another to suggest that States can tax or sue the tribe itself. In sum, *Potawatomi* cannot be read as a blanket extension of all of the protections traditionally accorded to Indian reservations to land whose sole connection to an Indian tribe is that it originally was allotted to a member of that tribe.

Although the Court's decisions in this area have not explored the relevant principles in detail, we believe that *McClanahan* reflects the fundamental principle that Indians who are part of a reservation community—living there and earning their income there—are beyond the reach of the State's taxing jurisdiction. For that reason, the court of appeals erred in extending *McClanahan*'s protections to tribal members without regard to their residence. The ramifications of the court of appeals' view on that

point are striking; any Indian residing in Oklahoma City could avoid the state income tax by accepting any job on his tribe's reservation. The protections customarily afforded to Indians do not extend so far. Cf. *Morton* v. *Ruiz*, 415 U.S. 199, 222 (1974) (referring to BIA practice with respect to "Indians who had left the reservations and moved to urban areas or who had attempted to be assimilated by the general population").

On the other hand, although the analytical basis for *McClanahan* was the definitively separate status of Indian reservations, the exemption from state jurisdiction discussed in that case should not always end at the formal reservation boundary. There are many Indian tribes in this country, and Congress has used various means to provide for the welfare of their members, means that are not always strictly limited to reservations. In some cases, unassimilated Indians live and work near a reservation as part of a reservation community.[15] In such a situation, Indians residing near the reservation, like those residing on it, may be exempt from state income taxes, especially if they reside on trust allotments. Cf. 18 U.S.C. 1152(b) ("Indian country" includes "all dependent Indian communities"); 42 U.S.C. 2000e-2(i) (prohibitions in Title VII do not apply to "any business or enterprise on *or near* an Indian reservation" (emphasis added).

In this case, both of the lower courts proceeded on the assumption that all lands allotted to members of an Indian tribe *automatically* continue as the func-

[15] See *Ruiz*, 415 U.S. at 224 (noting circumstances in which " 'leaving the reservation' meant something far different from moving 15 miles to a nonurban Indian village, while still maintaining close ties with the native reservation").

tional equivalent of a reservation for tax immunity purposes so long as the allotments remain in trust or restricted status, and that *McClanahan* requires nothing more than that the income of a tribal member be earned on trust lands, without regard for the residency of the individual, in order to be immune from the States' taxing powers. For the reasons stated above, those assumptions are incorrect. Because the formal reservation in this case was almost entirely disestablished, tribal members residing on allotted parcels should retain immunity from taxation only if they live and work as part of a reservation community. Because the lower courts did not address this question, or evaluate the evidence in the record (including the location and status of the trust allotments, see, *e.g.*, C.A. App. Exh. 15 (map of tribal lands and allotted parcels[16])) in this light, it would be appropriate for the Court to remand the case to allow the district court to consider the issue in the first instance.

B. Respondent's Interest in Self-Government May Bar Petitioner from Imposing an Income Tax on Salaries Respondent Pays to Tribal Members for Performing Services Associated with the Administration of Tribal Affairs

In addition to whatever immunity from the state income tax the Tribe's members might have to the extent they live and work in "Indian country" as part of a reservation community, members of the

[16] As a result of the fractionation process described in *Hodel* v. *Irving*, 481 U.S. 704 (1987), some of the allotments originally made to members of the Tribe may now be owned or occupied largely by persons who have little or no ongoing relationship with the Tribe.

Tribe who are employed by the Tribe itself (the only tribal members at issue here) also might have a measure of immunity drawn from "the right of reservation Indians to make their own laws and be ruled by them," *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980) (quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)). Because the Court's previous decisions generally have relied upon pervasive federal regulation of an activity, rather than Indian self-determination, as the basis for displacing state taxation of Indian affairs, see, *e.g.*, *ibid.*; *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832 (1982), the Court has not clarified the standards that would apply to such a claim. In our view, however, although respondent did not raise the issue in precisely this form in the courts below,[17] the circumstances of this case suggest the basis for a substantial argument that the challenged tax, at least in some cases, improperly infringes on respondent's interest in self-government.

It is common ground that the income in question is paid by respondent to its members as compensation for personal services rendered to the respondent Tribe.[18] Moreover, although the record does not re-

[17] We believe that this argument may be considered by the Court in light of respondent's argument to the court of appeals that petitioner's taxes were invalid because of "interference with tribal self-government." Resp. C.A. Br. 22-23. Respondent is entitled to assert any argument presented to the court of appeals as a basis for affirming the judgment of the court of appeals. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

[18] See Pet. i (first question presented relates to "Sac and Fox tribal members who are employed by the Sac and Fox Nation").

flect this, it is our understanding that the great majority of the income is received in return for services rendered at the tribal headquarters on respondent's extant reservation. Hence, it seems quite likely that the tax directly burdens the administration of the respondent Tribe by increasing the cost of administering tribal affairs, in areas subject to its jurisdiction.[19] That result is particularly problematic in light of the express protection in the allotment agreement of 1890 for the continuing use of that land by the Sac and Fox Agency and for a farm and school for the benefit of the Tribe as a whole. See 26 Stat. at 750-751. Application of the state income tax to tribal members in this case therefore may pose a substantial risk of an infringement on the right of reservation Indians to make their own laws and be ruled by them to the extent it burdens the Tribe's sovereign right to establish relationships with tribal officers and employees on reservation land without state interference.

In determining whether federal law preempts a particular assertion of state authority over an Indian reservation, the Court generally has conducted "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *E.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145 (1980)). In our view,

[19] See, *e.g.*, C.A. App. Exh. 46 (affidavit of Truman Carter, Treasurer of the Tribe, indicating that the challenged tax has been applied to the income he earns performing services for the Tribe); J.A. 20 (list of proposed witnesses for trial, indicating that petitioner applies the tax to the Chief, Second Chief, and Tax Commissioner of the Tribe).

a similar inquiry would be appropriate here.[20] Because the district court disposed of the present case on cross-motions for summary judgment, the record does not at this time provide an adequate basis for such an inquiry. Accordingly, it would be appropriate to vacate the judgment of the court of appeals with respect to the income tax for this additional reason, and remand the case so that the district court may consider this possible basis for preemption of the state income tax along with the possible claim based on the existence of a reservation community.

III. FEDERAL LAW DOES NOT AUTOMATICALLY BAR OKLAHOMA FROM IMPOSING PROPERTY TAXES ON VEHICLES OWNED BY INDIANS WHO RESIDE ON TRUST ALLOTMENTS OUTSIDE AN INDIAN RESERVATION

As discussed above, this case also involves two taxes petitioner has imposed on motor vehicles used in the State: an excise tax on the use of any vehicle registered in the State, 68 Okla. Stat. Ann. § 2103 (West 1992), and vehicle registration fees required to be paid by anyone owning a vehicle used in the State, 47 Okla. Stat. Ann. § 1132.A (West Supp. 1992). The lower courts erred in invalidating those taxes.

The only substantial bases offered for the decision of the lower courts were this Court's decisions in *Moe* v. *Confederated Salish & Kootenai Tribes*, 425

[20] Although the Court has adopted a per se rule as regards state taxation of activities on a reservation, see *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987), we believe, for the reasons stated in Point II.A, *supra*, that this per se rule should not apply here unless the tribal members reside (as well as work) as part of a reservation community.

U.S. 63 (1976), and *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). Those decisions invalidated taxes imposed on vehicles owned by an Indian tribe or its members who resided on a reservation. As we have discussed above, respondent's formal reservation is now limited to a small tract of land on which the tribal headquarters is located, and we understand that none of the Tribe's members live on that reservation. Accordingly, the decisions in *Moe* and *Colville* do not strictly apply. See *Colville*, 447 U.S. at 163-164 (noting that *Moe* held that a property tax "could not validly be applied to motor vehicles owned by tribal members who resided on the reservation"; commenting that the State "may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles").

On the other hand, just as with the income tax discussed above, it is possible in some cases that Indians who do not live within the formal boundaries of a reservation nevertheless will be part of a single reservation community that should be exempt from state taxes, whether on income or personal property. Because the court of appeals did not consider the State's taxing jurisdiction in this more focused light—but instead treated trust allotments as the equivalent of a reservation for this purpose, Pet. App. A6-A7—we suggest that the case be remanded to the district court for further consideration of the validity of the motor vehicle taxes and fees at issue in this case.[21]

[21] *Colville* does suggest that a State might be obligated to prorate motor vehicle taxes to account for on-reservation use. 447 U.S. at 163. Respondent did not allege in its complaint, however, that the vehicles were used primarily on the small reservation it still holds, or on individual allotments, or even that the use of the vehicles for transportation (as opposed to parking) occurs on *either* tribal or individual trust lands. See Compl. ¶¶ 18-28, J.A. 4-6. Both the excise tax and the registration fee are related to the use and value of the motor vehicle, which in turn rests on its use and value for transportation. If in fact all use of the vehicle for transportation occurs off of trust lands, as the record suggests, we see no basis for holding that the motor vehicle assessments are invalid.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded to the court of appeals with directions to remand to the district court for further consideration in light of the views expressed in this brief.

Respectfully submitted.

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No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE STATES OF ARIZONA, MINNESOTA, MONTANA, NORTH DAKOTA, UTAH AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether a State has jurisdiction to impose an income tax on a resident of the State who is a member of a recognized Indian tribe and receives income from employment on the reservation, but who lives outside the reservation.

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INTEREST OF THE AMICI CURIAE

This brief addresses the issue of state income taxation of tribal members who live outside reservations. The states filing as amici curiae in support of the Petitioner on this issue have a strong interest in the outcome. All are states with Indian reservations or trust land. All have Indian populations living within and outside reservations.[1] While the Court has previously ruled a state has

[1] For example, according to the 1990 Census, Arizona has a total American Indian population of 203,527, of whom 142,238

no jurisdiction to impose an income tax on a tribal member who both lives and earns income on the reservation, the opinion below would expand this rule to limit state jurisdiction outside reservations. The ability of states to finance off-reservation services by taxing off-reservation residents who enjoy the benefits of those services is threatened by such a holding. Absent express acts of Congress, the limitations imposed on state jurisdiction by the existence of Indian reservations within their boundaries should not be expanded to restrict state law outside reservations. The current case is important in that the court of appeals decision casts doubt upon the decisions of this Court which make a clear distinction between jurisdiction within and without reservations.

SUMMARY OF ARGUMENT

In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) this Court held the State of Arizona could not impose an income tax on a Navajo Indian residing on the Navajo Reservation for income earned exclusively on the Reservation. This holding does not prevent a state from taxing a tribal member who earns income on a reservation but resides off-reservation, beyond the exclusive jurisdiction of the tribe and United States. The court

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reside on reservations. The remaining 61,289 live throughout the State, outside any reservation. *1990 Census of Population & Housing, P.L. 94-171 Data*, prepared by: Arizona State Data Center, DES Population Statistics Unit. Many of the reservations in Arizona are contiguous to, or within reasonable commuting distance of, off-reservation population centers.

of appeals' extension of *McClanahan* to prevent the taxation of off-reservation residents is incorrect, and should be reversed.

An income tax based on the residence of the individual is not a tax on the place the income is earned, but on the receipt of the income within the jurisdiction of the taxing state. A state income tax on a resident who happens to be a member of an Indian tribe and who crosses the reservation line on a daily basis to earn wages, returning every night to a home outside the reservation, is not a tax on the reservation activity. It is a tax imposed on the state resident because of his residency.

Finally, an income tax on a nonresident of a reservation is not preempted by federal law, nor does it infringe on a tribe's self-government. A tax imposed outside a reservation will be preempted only by an express act of Congress. Congress has never acted to impose a general limit on the power of states to tax their own residents who have removed themselves from the exclusive jurisdiction of the tribes and federal government. Such a tax is no threat to the authority of the tribe. The most that can be said is that a state and a tribe both have jurisdiction to tax the same income. The imposition of taxes by separate sovereigns is not a basis for limiting State taxation. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT *MCCLANAHAN* REQUIRES RESIDENTS AND NONRESIDENTS OF A RESERVATION BE TREATED THE SAME FOR STATE INCOME TAX PURPOSES.

In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) the Court was presented with the problem of a state income tax imposed on a reservation Indian whose entire income came from reservation sources. The Court held the state had no jurisdiction to tax the reservation Indian on such income. The court of appeals has used this case as authority for holding a tribal member who earns income on a reservation, or trust land, is exempt from state income tax, without regard to the residence of the tribal member. *Sac and Fox Nation v. Oklahoma Tax Commission.*, 967 F.2d 1425, n. 3 (10th Cir. 1992).

This extension of *McClanahan* ignores the predominant interest of states in taxing residents who benefit from the protections of state government, and ignores rulings of this Court which draw a clear line between reservation and off-reservation activities for purposes of state jurisdiction. In ruling as it did, the court of appeals failed to heed the admonition of this Court that mechanical applications of Indian law concepts are inappropriate, and each case calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, . . . " *White Mountain Apache Tribe v. Bracker*, 448

U.S. 136, 145 (1980).[2] *McClanahan* does not control the issue of state income taxation of Indians who do not reside on a reservation.

In *McClanahan* the state income taxes at issue were imposed on a tribal member who resided on the Indian reservation. The Court repeatedly pointed out that the rationale for its holding was the fact that the appellant lived on the reservation. The opinion begins by stating: "We are not here dealing with Indians who have left or never inhabited reservations set aside for their exclusive use . . . " *McClanahan*, 411 U.S. at 167. In describing the issue the Court said: "Rather, this case involves the narrow question whether the State may tax a reservation Indian for income earned exclusively on the reservation." *Id.* at 168. While explaining "that state law could have no role to play within the reservation boundaries" (*Id.* at 168), the Court noted that "the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." *Id.* at 171. Throughout the opinion the issue is framed in terms of Indians living on the reservation. "Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation." *Id.* at 175. "This Court has therefore held that 'the question has always been whether the state action infringed on the right of *reservation Indians* to make

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[2] The appellate courts of Wisconsin have performed the required analysis, and correctly concluded nonresidents of a reservation are subject to state income tax on wages earned on a reservation. *Anderson v. Wisconsin Department of Revenue*, 163 Wis.2d 1015, 473 N.W.2d 520 (App. 1991), *aff'd.*, 169 Wis.2d 255, 484 N.W.2d 914 (1992), *petition for cert. filed*, No. 92-5988.

their own laws and be ruled by them.' " *Id.* at 181, quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959). The emphasis on reservation Indians was added by the *McClanahan* court. In conclusion the Court said, "appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." *Id.* at 181.

A review of the authorities relied upon by the Court also shows the ruling does not extend to protect off-reservation residents from state taxation. The Court strongly relied on the treaty between the United States government and the Navajo Nation as setting the Reservation apart for the exclusive use of the Navajos, to the exclusion of state jurisdiction. *Id.* at 173-5. However, the treaty provides "that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty, . . . " Treaty with the Navajo Indians of 1868, 15 Stat. 667, 671. The Treaty expressly excludes nonresidents of the Reservation from its scope.

Similarly, the Arizona Enabling Act, relied upon by the Court, distinguishes between property within and without reservations. "The Act expressly provides that 'nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed *outside of an Indian reservation* owned or held by any Indian.' " *McClanahan*, 411 U.S. at 176, quoting Arizona Enabling Act, 36 Stat. 569, 570 (emphasis added by Court). The Court relied on the negative implications of the quoted language for its determination that a tax on a reservation resident was

beyond the State's jurisdiction. Conversely, the clear intent of Congress as expressed in the Arizona Enabling Act is that an Indian going outside the reservation is subject to generally applicable state taxes.

Finally, the Court considered how a State tax on a reservation Indian residing on the reservation would fit into the overall scheme of jurisdiction. The Court noted the State lacked both civil and criminal jurisdiction over reservation Indians, and wondered "how, without such jurisdiction, the State's tax may either be imposed or collected." *McClanahan*, 411 U.S. at 178. These jurisdictional questions are easily resolved with regard to a nonresident of a reservation. The state has full civil and criminal jurisdiction over its residents, whether members of an Indian tribe or not, and it "may constitutionally administer its tax system" with regard to those residents without ever entering a reservation. *Id.*

The court of appeals' mechanical application of *McClanahan* to the issue of state taxation of nonresidents of a reservation or trust land fails to consider the rationale of that case. *McClanahan* was limited to reservation Indians, not only as a matter of fact, but of law. The reasons set forth by the Court, and the policies underlying its holding, require a different result for tribal members who do not live on their reservation.

II. STATES MAY IMPOSE AN INCOME TAX ON THE INCOME OF RESIDENTS FROM WHATEVER SOURCE, EVEN IF THE INCOME IS DERIVED FROM SOURCES BEYOND THE STATE'S JURISDICTION.

This Court's ruling in *McClanahan* requires a state to treat a reservation Indian who earns income exclusively from reservation sources as being beyond the taxing jurisdiction of the state. With regard to activities that cross reservation lines the leading treatise on Indian law has stated that "the usual rules respecting activities affecting two taxing jurisdictions should apply." F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), p. 417.[3] Applying the usual rules that govern a state's power to tax the income of its residents requires a holding that a state may tax a tribal member residing off-reservation on income derived from the reservation.

This Court has consistently held that a state may tax its residents on their income from sources outside the state's jurisdiction. *Lawrence v. State Tax Comm.*, 286 U.S. 276 (1932); *Maguire v. Trefry*, 253 U.S. 12 (1920).[4] In so

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[3] "Thus an Indian residing within a reservation but earning some income off the reservation can be taxed to the extent of the off-reservation income, provided that the state bases its income tax on place of earning. An Indian residing outside Indian country can be taxed based on residence provided that the state bases its income tax on residence." F. Cohen, *Handbook of Federal Indian Law* (1982 ed.), p.417 (footnotes omitted). States with income taxes do base them alternatively on residence or place of earning. *E.g.*, Arizona Revised Statutes § 43-1011 (Supp. 1992).

[4] This Court has also held a state may tax a nonresident for income earned within the state. *Shaffer v. Carter*, 252 U.S. 37

holding the Court has recognized that even when a state lacks jurisdiction to tax the source of the income the residence of the recipient of the income within the state is sufficient to give the state jurisdiction to impose an income tax. The rationale for this principle has been explained as follows:

> That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded to the recipient of the income by the state, in his person, on his right to receive the income, and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. . . .
>
> Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason, income is not necessarily clothed with the tax immunity enjoyed by its source.

New York ex rel. Cohn v. Graves, 300 U.S. 308, 312-3 (1937).

The court of appeals incorrectly perceived the state income tax as a tax on the reservation activity. As the authorities noted above show, this is erroneous. An

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(1920). Applying this reasoning a state can tax a tribal member residing on a reservation who goes outside the reservation to work.

income tax on a resident is not a tax on property or activities outside the state, but a tax imposed in exchange for the benefits conferred by virtue of residence. To the extent a state bases its income tax on residency, and taxes its residents on all income, it matters not whether that income comes from another country, another state, or an Indian reservation. The tax "is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received." *Lawrence*, 286 U.S. at 281.[5]

A tribal member earning income on a reservation, but living off the reservation, enjoys the benefits of residence no less than any other resident of the state. Equally, the obligation of a tribal member resident to share in the

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[5] The off-reservation situs of a tax on income distinguishes this case from those cases finding a preemption of a state tax imposed on businesses traveling into a reservation to sell products or perform activities subject to a gross receipts tax. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 169 (1980). The basis for sales and gross receipts taxes is the location of the taxed activity within the jurisdiction of the state. A state cannot impose an unapportioned sales tax on transactions crossing jurisdictional lines. However, as discussed above, a state may tax a resident on all income, including income from outside the state's jurisdiction.

As a district court judge has succinctly put it, "[t]he situs of the income is where the taxpayer lives, not where he works. Thus, the State is not attempting to impose its taxing authority within the exclusive jurisdiction of the United States and the tribes. It only seeks to tax those within the reach of its taxing power." *Dillon v. State of Montana*, 451 F.Supp. 168, 174 (D.Mont. 1978), *rev. on other grounds*, 634 F.2d 463 (9th Cir. 1980).

expenses relating to such benefits by paying taxes is no less than any other state resident. Furthermore, a state resident who does not reside on an Indian reservation is the recipient of benefits which may not be available on the reservation. The ruling of the court of appeals would hold, contrary to the precedents of this Court, that a tribal member may reside outside a reservation, within the jurisdiction of the state, receive the benefits of such residence, and yet not be taxable on the same basis as other off-reservation residents of the state. Neither federal statutory law, nor decisions of this Court, support such a ruling.

There are few bright lines in Indian law. The reservation boundary is one of those. The immunity from state law enjoyed by Indians within reservations cannot be extended to those who choose to leave its protection. Tribal members who live outside the reservation are subject to a state income tax on their total income.[6]

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[6] In *Anderson v. Wisconsin Dept. of Revenue* the tribal member who lived off-reservation argued the determination of whether a person was a "reservation Indian" for purposes of *McClanahan* should depend not on residence, but on cultural orientation and degree of assimilation. 484 N.W.2d at 922. A similar "contacts" test was rejected in *Duro v. Reina*, 495 U.S. 676, 695-6 (1990) in the context of tribal criminal jurisdiction over nonmember Indians. Accepting this argument in the context of an income tax would raise the spectre of determining taxability on an individual basis, considering contacts with the reservation, degree of assimilation, and ties to tribal government. Under such an approach the reservation boundary would disappear as the dividing line between state and tribal jurisdiction.

III. A STATE INCOME TAX ON A NONRESIDENT OF A RESERVATION IS NOT PREEMPTED BY FEDERAL LAW, NOR DOES IT INFRINGE ON TRIBAL SOVEREIGNTY.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-9 (1973). A tribal member going outside the reservation to live must be prepared to comply with the same laws as other state residents, including state income tax laws applicable to all citizens of the state. Absent an express act of Congress exempting reservation income from such a tax, Indians living off the reservation are subject to state income tax in the same manner as other state citizens. No express act of Congress was cited by the court of appeals in its opinion. None exists.

A state tax imposed within a reservation is generally precluded because "the federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17 (1987). Indians going outside reservations to live enjoy no tradition of immunity from state law, and the state has significant interests in imposing generally applicable taxes on all residents. Absent express federal law, such taxes are not preempted, nor do they infringe on tribal sovereignty.[7]

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[7] Economic impact on a tribal employer is not enough to justify preemption of a state tax. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989). Nor does the possibility of the imposition of both a state and tribal tax infringe on tribal sovereignty. *Id.* at 189; *Colville*, 447 U.S. at 158-9. A concurring opinion in *Colville* aptly pointed out that Indians must recognize the sovereign status of states in tax matters: "If Indians are to function as quasi co-sovereigns with the States, they like the States, must adjust to the economic realities of that status as every other sovereign competing for tax revenues, absent express intervention by Congress." 447 U.S. at 186 (Rehnquist, J., concurring).

CONCLUSION

The judgment of the court of appeals that a tribal member who resides outside the reservation is not subject to state income tax on income earned on the reservation should be reversed.

Respectfully submitted.

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(December 1992)

No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF THE NAVAJO NATION AND THE PUEBLO OF LAGUNA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

This case concerns Oklahoma's attempt to tax the income and motor vehicles of Sac and Fox tribal members who earn their income and garage their vehicles in Sac and Fox Indian country. In effect, Oklahoma urges that the Court distinguish prior cases invalidating analogous taxes solely because most of the Sac and Fox tribal territory is Indian country by virtue of 18 U.S.C. § 1151(b) and (c), rather than 18 U.S.C. § 1151(a), which identifies Indian reservations as one category of Indian country.

The Navajo Nation and Pueblo of Laguna govern and provide extensive governmental services for large areas

which carry no formal "reservation" designation. Much of the 2.8 million acre Navajo "checkerboard" area in New Mexico is outside formal reservation boundaries, but consists of an overwhelmingly Navajo land base and population, who depend on tribal and federal, rather than state, services.[1] The Pueblo of Laguna lands exceed 450,000 acres of restricted fee land, Executive Order reservation land, land acquired in trust under the Indian Reorganization Act, 25 U.S.C. § 465, and trust allotments within the tribal territory.[2]

Amici curiae Navajo Nation and the Pueblo of Laguna have vital interests in preserving immunities from state taxes in all of Indian country. Some of the lands of the Pueblo of Laguna are not formally designated as an Indian "reservation," but, rather, have the status of a

[1] The Navajo Nation government payroll exceeds $100,000,000. The states provide few services in Navajo Indian country. *See Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 834 n.1 (1982) (referring to the "tribal children abandoned by the State" in the off-reservation Ramah Navajo community); *Navajo Nation v. New Mexico*, 975 F.2d 741, 745 (10th Cir. 1992) (New Mexico's unlawful diversion of funds intended for Navajos under Title XX of the Social Security Act was motivated by "discriminatory intent"); *Pittsburg & Midway Coal Mining Co. v. Saunders*, No. CIV 86-1442 M (D.N.M. Aug. 22, 1988), reproduced at 909 F.2d 1387, Appendix C at 1437 (10th Cir. 1990) ("The contribution of the State of New Mexico is small .... The [Navajo] Tribe proved up many more indications, too numerous to detail here, of the dominance of the Navajo Nation over life" in a disputed reservation area in the Eastern Navajo Agency.), *rev'd on other grounds*, 909 F.2d 1387 (10th Cir.), *cert. denied*, 111 S. Ct. 581 (1990).

[2] United States Dep't of Commerce, *Federal and State Indian Reservations and Trust Areas* 359 (1974) (USGPO stock #0311-00076). *See Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958).

dependent Indian community under 18 U.S.C. § 1151(b).[3] Laguna tribal members occupied Pueblo lands before 1700, and members of the Pueblo work at tribal headquarters on land granted in fee by Spain. The Pueblo government not only provides traditional governmental services, but has also established on its lands Laguna Industries, Inc. and Laguna Construction Company, the two largest employers of its tribal members.

Similarly, the Ramah Navajo community is not formally designated as an Indian reservation, but is a dependent Indian community.[4] Under the federal policy favoring Indian self-determination and following this Court's invalidation of certain state gross receipts taxes in *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982), the Navajo Nation has made great advances in providing educational opportunities and governmental services to the Ramah Navajo community.

Many Navajo tribal members are employed by the Navajo Nation on other tribal trust lands with no formal reservation designation, and these tribal members are engaged not only in providing essential governmental services but also in, for example, farming on trust lands provided by Congress for the 110,630-acre Navajo Indian Irrigation Project. *See* Act of June 13, 1962, P.L. 87-482, 76 Stat. 96. These and other Navajo tribal trust lands "qualif[y] as a reservation for tribal immunity purposes." *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991).

[3] *See United States v. Chavez*, 290 U.S. 357 (1933).

[4] *See United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971).

In addition, the Navajo Nation and the Pueblo of Laguna both exercise jurisdiction over trust allotments within their tribal territories. These allotments form a significant part of the tribal land base, and the tribes have acquired undivided fractional trust interests in hundreds of these allotments pursuant to the amended "escheat" provision of the Indian Land Consolidation Act, which promotes the return to tribal trust status of all allotments under tribal jurisdiction.[5]

Because of federal and state neglect, the Navajo Nation and Pueblo of Laguna face staggering housing and infrastructure deficits.[6] Thus, many tribal employees must live in off-reservation border towns and commute to tribal offices. Burdening further these tribal employees with state taxes on income derived solely from their tribal employment would seriously undermine the ability of the tribes to attract and retain the highly qualified tribal members needed for effective governmental operations and would dilute the already thin tribal tax base. *See Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976).

STATEMENT OF FACTS

In 1789, the United States "receive[d] into their friendship and protection, the nations of the . . . Sacs" *Treaty with the Wyandot, etc., 1789*, II Charles J. Kappler,

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[5] 25 U.S.C. § 2206. One court has observed that it is "only a matter of time" before the tribes will own all of the allotments. *See Irving v. Watt*, 11 Indian L. Rep. (Am. Indian Law. Training Program) 3009, 3010 n.2 (D.S.D. 1983), *rev'd on other grounds*, 758 F.2d 1260 (8th Cir. 1985), *aff'd*, 481 U.S. 704 (1987).

[6] *See* Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. Rev. 275, 278-80 (1991).

Indian Affairs: Laws and Treaties (hereinafter "II Kappler") 18, 21 (1904). Again, in 1804, the "United States receive[d] the united Sac and Fox tribes into their friendship and protection, and the said tribes agree[d] to consider themselves under the protection of the United States and no other power whatsoever." *Treaty with the Sauk and Foxes, 1804*, II Kappler at 74.

The 1804 Treaty, whereby a delegation of the Sac and Fox purported to cede Illinois and parts of two other states in exchange for gifts and $1000 in annuities, set the stage for future discord. William T. Hagan, *The Sac and Fox Indians* 21-25 (1958). Led by Sac warrior Black Hawk, the Sac and Fox joined the British in the War of 1812, defeating Zachary Taylor's command at Rock River in 1814. *Id.* at 67-72. After the war, the United States again sought peace with the Sac and Fox, and entered into treaties with the various bands. *Treaty with the Sauk, 1815*, II Kappler at 120; *Treaty with the Foxes, 1815*, II Kappler at 121; *Treaty with the Sauk, 1816*, II Kappler at 126. In conformity with the Treaty of Ghent, these treaties placed the tribes on the same footing as they stood before the war, and confirmed the 1804 Treaty. *See Treaty with the Sauk, 1816*, II Kappler at 126 (Preamble).

The United States entered into other treaties with the Sac and Fox in 1822, 1824, 1825 and 1830. II Kappler at 202, 207, 250 and 305. After Black Hawk's "British Band" of forty warriors routed a militia of three to four hundred men and after depredations by allied tribes were reported, President Jackson assigned Generals Winfield Scott and Henry Atkinson to subdue Black Hawk and his followers, which they did in 1832. *The Sac and Fox Indians* at 159-69. A party of Winnebagos captured Black Hawk, who was turned over to Colonel Zachary Taylor, who in turn placed Black Hawk under the guard of Lieutenant

Jefferson Davis. *Id.* at 195. Another treaty followed, ceding additional land. II Kappler at 349.

From 1832 to 1861, the United States entered into ten more treaties with the Sac and Fox, who moved from state to state and reservation to new reservation. *Id.* at 468, 473, 474, 476, 495, 497, 546, 631, 796 and 811. The final treaty with the Sac and Fox was ratified in 1868. *Treaty with the Sauk and Foxes, 1867*, II Kappler at 951. In it, the United States agreed to establish a new reservation for the Sac and Fox "in the Indian country south of Kansas," and to pay for subsistence "for the first year after their arrival at their new home in the Indian country." *Id.* at 952, 954.

The new Sac and Fox homeland remained intact for 23 years. In 1891, the Dawes Severalty Act was applied there, supported by only a "small minority" of tribal members. *The Sac and Fox Indians* at 255. Some tribal members selected contiguous allotments so that the allotments could continue to be used as common land. *Id.* at 257. However, most of the allotments were almost immediately leased to unscrupulous whites because of a lack of Indian capital and fractionated heirships. *Id.* at 257-58. Worse yet, Oklahoma unlawfully imposed a heavy tax burden on personal property and productive activity on the allotments. *Id.* at 258. Oklahoma's tax scheme prevented the Sac and Fox " 'from making improvements, has caused many to scatter and leave the Reservations, prevented others that were away from returning, demoralized and discouraged them from trying to advance in civilization.' " *Id.* (quoting an 1893 memorandum to the Commissioner of Indian Affairs).

Prior to 1936, the Bureau of Indian Affairs allowed tribal self-determination for the Sac and Fox "as long as it

was confined to innocuous matters." *Id.* at 259. In 1936, however, Congress abandoned the assimilationist philosophy for Indians in Oklahoma, and passed the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §§ 501-509. The OIWA was intended to "permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [Indian Reorganization Act of 1934]." H.R. Rep. No. 2408, 74th Cong., 2d Sess. 3 (1936). *See Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443-46 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989); *Powers of Indian Tribes*, 55 I.D. 14 (1934).

Pursuant to the OIWA, the Sac and Fox reorganized their tribal government under a new constitution.[7] The Sac and Fox government is recognized by the United States. 44 Fed. Reg. 7235, 7236 (1979). Federal policies now support tribal self-determination and a government-to-government relationship between the tribes and the United States. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200-01 (1985).

Oklahoma seeks here to inaugurate a new, lower class of tribal governmental status for the Sac and Fox, solely because the Sac and Fox assertedly have no formally designated reservation boundaries.[8] State taxation of tribal members and their personal property in the Tribe's Indian country would do just that.

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[7] *Federal and State Indian Reservations and Trust Areas, supra* n.2, at 473.

[8] The United States holds 805 acres in trust for the tribe and over 17,000 acres of Sac and Fox allotments in trust status. *Federal and State Indian Reservations and Trust Areas, supra* n.2, at 472.

SUMMARY OF ARGUMENT

This case involves the applicability of state taxes to tribal Indians who work and own property in Indian country. The need to end the "case-by-case litigation which has plagued this area of the law" has been recognized. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 177 (1980) (Rehnquist, J., concurring and dissenting). The Court of Appeals correctly and succinctly applied the standards established by this Court; Oklahoma ignores them and would replace an examination of Congressional intent with a burdensome and unworkable series of individualized inquiries.

The Court has established a clear test for cases such as this one: state taxation of Indians in Indian country is unlawful unless Congress has expressly conferred that authority in unmistakably clear terms. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985). Oklahoma can point to no such Congressional authorization to tax the Sac and Fox. Rather, Oklahoma attempts to extend state taxation over Sac and Fox trust lands on the grounds that the Tribe's 1868 treaty reservation was disestablished and that the Sac and Fox Indians are sufficiently assimilated to shoulder the added burden. Petitioner's Brief at 12-14.

Oklahoma and the *amici curiae* supporting Oklahoma would have the courts conduct a "particularized inquiry into the state, federal and tribal interests" in each case where states seek to tax Indians in their tribal territory. Petitioner's Brief at 7; Brief of *Amicus Curiae* United States at 8; Brief of *Amici Curiae* Arizona, *et al.*, at 4. The United States would require the federal courts to determine which of the Indian people "live and work as part of a reservation community." Brief of *Amicus Curiae* United States at 20. Oklahoma and its *amici* would also

require the courts to determine the degree of assimilation of each putative Indian taxpayer. Petitioner's Brief at 13; Brief of *Amicus Curiae* United States at 19; Brief of *Amici Curiae* Arizona, *et al.*, at 11 n.6. Under Oklahoma's approach, what should be a focused examination of Congressional intent would degenerate into annual battles of expert anthropologists and sociologists arguing over which of the 2500 or so Sac and Fox are assimilated enough to be penalized by Oklahoma's taxes.

No such burdensome and demeaning hearings need be conducted. As long as the government of the Sac and Fox people "is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others' . . . separated from [state] jurisdiction." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 169 (1973), quoting *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867). Because Congress preserved all sovereign powers of the Oklahoma tribes in the Oklahoma Indian Welfare Act and because the Sac and Fox government is federally recognized, the assimilation issue is irrelevant. *McClanahan*, 411 U.S. at 172-73 & n.12; *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 476 (1976); *United States v. John*, 437 U.S. 634, 652-53 (1978). The "particularized inquiry into the state, federal and tribal interests" is appropriate only in cases involving state taxation of *non*-Indians. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *McClanahan*, 411 U.S. at 179; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 and 215 n.17 (1987).

McClanahan controls the income tax issue. Although Mrs. McClanahan earned her income within formal reservation boundaries, the reasoning of *McClanahan* encompasses all of Indian country and is in part predicated on Indian country legislation. *McClanahan*, 411 U.S. at 169 &

n.4, 177-79. The Court confirmed this in *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). Mrs. McClanahan worked for a private employer within Navajo Indian country. If, as this Court held, state taxes on her income infringed on the right of the Navajo people to make their own laws and be ruled by them, *McClanahan*, 411 U.S. at 179, then Oklahoma's taxes on the income of Sac and Fox Indians who work for the Sac and Fox Tribe in Sac and Fox Indian country must necessarily violate tribal sovereignty. Absent an act of Congress expressly allowing such taxes, they are unlawful.

The Court of Appeals properly discerned that Oklahoma seeks to evade the holding of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), by simply changing the characterization and means of collection of its motor vehicle taxes. This Court has previously rejected a similar attempt in *Colville*, 447 U.S. at 162-64, and should do so again.

No act of Congress authorizes Oklahoma's taxes of the Sac and Fox people or of Indian property in Sac and Fox Indian country. Thus, the state taxes are unlawful and the decision below should be affirmed.

ARGUMENT

I. "INDIAN COUNTRY" PROVIDES THE TERRITORIAL BENCHMARK FOR ALLOCATING FEDERAL, TRIBAL AND STATE GOVERNMENTAL AUTHORITY.

Congress first used the term "Indian country" in the original Trade and Intercourse Act of July 22, 1790, ch. 33, 1 Stat. 137 (1845). The term was not defined until the Act of May 19, 1796, ch. 30, 1 Stat. 469 (1845). In the 1796 act

and in those following it, "the term 'Indian country' is used as descriptive of the country within the boundary lines of the Indian tribes." Felix S. Cohen, *Handbook of Federal Indian Law* 6 (1942) (University of New Mexico Press reprint n.d.).

"Indian country" was defined again in the Act of June 30, 1834, ch. 161, 4 Stat. 729 (1846). This act included both civil provisions (trader licensing and passport requirements) and criminal provisions, and applied the same definition of "Indian country" to both. The Revised Statutes failed to include the 1834 "Indian country" definition and it was therefore repealed. Because of the statutory void, however, the Court continued to refer to the 1834 definition. *See United States v. John*, 437 U.S. 634, 649 n.18 (1978).

After 1834, in response to changing conditions, this Court expanded the scope of Indian country as defined in the 1796 act. *Id.* The Court focused on whether land was " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991), *quoting United States v. John*, 437 U.S. 634, 648-49 (1978). The Court determined that executive order reservations, off-reservation allotments, restricted fee allotments in Oklahoma, and other land set apart by the United States for the Indian people constituted Indian country. *Donnelly v. United States*, 228 U.S. 243 (1913) (executive order reservation); *United States v. Sandoval*, 231 U.S. 28 (1913) (Pueblo lands in New Mexico held in communal fee); *United States v. Pelican*, 232 U.S. 442 (1914) (allotment in disestablished reservation); *United*

States v. Ramsey, 271 U.S. 467 (1926) (restricted fee allotment in Oklahoma); *United States v. McGowan*, 302 U.S. 535 (1938) (land set aside for Reno Indian Colony).

Congress has plenary authority in Indian affairs, *e.g.*, *Tiger v. Western Investment Co.*, 221 U.S. 286, 311 (1911), and in 1948 Congress codified the Court's Indian country decisions. 18 U.S.C. § 1151. *See* Reviser's note following 18 U.S.C.A. § 1151 (West 1984). Soon thereafter, Congress demonstrated its understanding that "Indian country" defines the area where state criminal and civil laws generally do not apply. Section 2 of the Act of August 15, 1953, ch. 505, 67 Stat. 588, known as P.L. 280, provided that five states – not including Oklahoma – would have jurisdiction over violations of the states' criminal law in the "areas of Indian country" listed. *See* 18 U.S.C. § 1162(a). Section 4 of P.L. 280 provided that the same five states would have "jurisdiction over civil causes of action . . . in the areas of Indian country listed." 28 U.S.C. § 1360(a).

In 1968, Congress amended P.L. 280 to require tribal consent before states could assume jurisdiction in Indian country. Again, Congress used the term "Indian country" in describing the territory over which state criminal and civil jurisdiction could be extended with tribal consent. 25 U.S.C. §§ 1321(a), 1322(a). Accordingly, this Court concluded that Congress intended "Indian country" to define generally the limits of state authority in civil matters involving Indian interests. *See Williams v. Lee*, 358 U.S.

217, 220-23 & n.6 (1959); *Kennerly v. District Court*, 400 U.S. 423, 424-25 & n.1 and 427-29 (1971); *McClanahan*, 411 U.S. at 177-78.

This Court unequivocally affirmed this conclusion in 1975. Citing *Williams*, *Kennerly*, and *McClanahan*, the Court in *DeCoteau v. District County Court*, stated:

> While [18 U.S.C.] § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.

420 U.S. 425, 427 n.2. The Court recently confirmed the vitality of this conclusion. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987). The tribal territory is, and has been for more than 200 years, "Indian country." *Felix S. Cohen's Handbook of Federal Indian Law* 27 (R. Strickland ed. 1982).[9] The reservation "bright line" posited by Arizona, Brief of *Amici Curiae* Arizona, *et al.*, at 11, is an illusion. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991). The proposition that Indians are protected from state taxation only on formally designated reservations ignores the many other ways by which the United States has set aside lands for the use and benefit of Indian people.

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[9] *Accord Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1165 n.1 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991); *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988); *Indian Country U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 973 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988); *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373, 379 n.31 (4th Cir. 1980). *See Judicial and Departmental Construction of the Words "Indian Reservation"*, II Op. Solic. Interior Dep't 1378 (1945) (neither the courts nor the Department of the Interior have ever attempted to define the term "Indian reservation"; both have been more concerned with the definition of "Indian country").

II. CONGRESS HAS NOT AUTHORIZED OKLAHOMA TO TAX SAC AND FOX TRIBAL MEMBERS EMPLOYED IN SAC AND FOX INDIAN COUNTRY.

A. *McClanahan* Applies throughout "Indian Country."

The wage earner in *McClanahan* worked within reservation boundaries. The analysis of *McClanahan* shows that the reservation context was significant not in and of itself, but because reservation lands are "Indian country."

After discussing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which held that states may not extend their criminal laws to the tribal territory, the Court in *McClanahan* stated:

> Although Worcester on its facts dealt with a State's efforts to extend its criminal jurisdiction to reservation lands,[4] the rationale of the case plainly extended to state taxation within the reservation as well.

411 U.S. at 169. In elaborating on the meaning of the term "reservation lands," footnote four cited to three cases: *Williams v. United States*, 327 U.S. 711 (1946); *United States v. Chavez*, 290 U.S. 357 (1933); and *United States v. Ramsey*, 271 U.S. 467 (1926). *Id.* These three pre-1948 cases represent the three types of "Indian country" codified in 18 U.S.C. § 1151: reservations (*Williams*), dependent Indian communities (*Chavez*) and trust or restricted allotments (*Ramsey*).

The Court's discussion of P.L. 280 also reflects the controlling effect of Indian country status. The *McClanahan* Court noted that P.L. 280 "expressly provides that the State must act 'with the consent of the tribe

occupying the particular *Indian country*,' 25 U.S.C. § 1322(a)[17]" in order to assume civil and criminal jurisdiction over Indians. 411 U.S. at 177 (emphasis added). Footnote 17 then explains that P.L. 280 delegated to certain states "civil and criminal jurisdiction over Indian *reservations*." (Emphasis added.) The Court thus appears to use the terms "Indian country" and "reservation" interchangeably in *McClanahan*.

If there were any questions about the basis for the Court's holding in *McClanahan*, the Court soon provided ample clarification. In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court faced questions of a state court's subject matter jurisdiction in consolidated civil and criminal cases involving Indians. *DeCoteau*'s analysis was predicated on the proposition that "[w]hile [18 U.S.C.] § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction. *McClanahan v. Arizona State Tax Comm'n*." *DeCoteau*, 420 U.S. at 427 n.2. In the same footnote, *McClanahan* is also cited as authority for the observation that "[e]ven within 'Indian country,' a State may have jurisdiction over some persons or types of conduct, but this jurisdiction is quite limited." *Id.*

Thus, the *McClanahan* analysis governs in cases where Indians are employed in Indian country. Oklahoma concedes here that the Sac and Fox lands are Indian country and under Sac and Fox jurisdiction. Petitioner's Brief at 14. The inquiry must focus, therefore, on whether Congress has expressly provided that Oklahoma's tax laws shall apply to the Sac and Fox. *McClanahan*, 411 U.S. at 170-71; *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976); *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 688 (1992). Congress must make its intent to allow such

state taxes " 'unmistakably clear.' " *County of Yakima*, 112 S. Ct. at 688, quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-65 (1985) (referring to state taxation of Indians "within their own territory").

B. The 1891 Sac and Fox Allotment Agreement Does Not Grant Oklahoma the Power to Tax the Income of Tribal Members Employed in Indian Country.

Oklahoma relies on the Sac and Fox Allotment Agreement, Act of February 13, 1891, ch. 165, 26 Stat. 749, as the sole source of congressional authority for its taxing power over the Sac and Fox, and asserts that Oklahoma's income tax is "not pre-empted . . . because the Sac and Fox Allotment Agreement does not preclude the extension of state law." Petitioner's Brief at 12. However, the mere *absence* of a Congressional statement *precluding* taxes hardly constitutes an unmistakably clear expression by Congress that state taxes *shall* apply. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 766-67; *Bryan v. Itasca County*, 426 U.S. at 389. *Cf. County of Yakima*, 112 S. Ct. at 693-94 (statute authorizing "taxation of . . . land" does not authorize taxation of the proceeds from sale of former Indian trust land).

Oklahoma's view of the effect of the application of the Dawes Severalty Act to the Sac and Fox in 1891 conflicts directly with decisions of this Court and with historical fact. *See, e.g., DeCoteau*, 420 U.S. at 446 (trust allotments in disestablished reservation were meant to "provide an adequate fulcrum for tribal affairs" and are under "exclusive tribal and federal jurisdiction"); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-79 (1976). *Accord Ahboah v. Housing Auth. of Kiowa Tribe*, 660

P.2d 625, 627-29 (Okla. 1983). The Oklahoma Organic Act "expressly preserved tribal authority and federal Indian jurisdiction" throughout all of Oklahoma. *Felix S. Cohen's Handbook of Federal Indian Law* 773 (R. Strickland ed. 1982). "In passing the enabling act for the admission of the state of Oklahoma, . . . Congress was careful to preserve the authority over the Indians, their lands and property, which it had prior to the passage of the act." *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911). "Since statehood [in 1907], the status of Indian tribes in Oklahoma has been similar to that of tribes in other states." *Felix S. Cohen's Handbook of Federal Indian Law* 774 (R. Strickland ed. 1982).

> Although the land base of the tribes in Oklahoma has been reduced by the allotment process, their inherent powers of self-government over those areas that remain Indian country are undiminished. Neither the General Allotment Act nor most of the special allotment and cession agreements and statutes of individual tribes limit powers of self-government.

Id. at 779-80.[10]

As a substitute for an act of Congress authorizing Oklahoma's taxes on the Sac and Fox, Oklahoma urges the Court to engage in a "particularized inquiry into the nature of state, federal, and tribal interests at stake."[11] However, this inquiry is appropriate only when states seek to tax *non*-Indians doing business in Indian country. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,

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[10] This Court has recognized the 1982 Cohen treatise as a "leading treatise" in Indian law. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855 n.17 (1985).

[11] *See* Petitioner's Brief at 7; Brief of *Amici Curiae* Arizona *et al.*, at 4; Brief of *Amicus Curiae* United States at 8.

144-45 (1980); *McClanahan*, 411 U.S. at 179; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 and 215 n.17 (1987) (In cases involving state taxation of tribal members "[i]t is unnecessary to rebalance these interests in every case.").

C. The Same Considerations Which Confirmed the Holding in *McClanahan* Apply to This Case.

1. THE TREATY

The Sac and Fox, like the Navajo, entered into treaties with the United States. In the 1868 Treaty with the Sac and Fox, the United States agreed to provide a "new home" for the Tribes, on a tract of land of about 750 square miles. Delegations of the Tribes assisted in the selection of the new Sac and Fox homeland. The reservation was set apart for them by the United States in the Indian Territory, *i.e.*, the area "set apart for the sole use and occupation of various Indian tribes." *Atlantic and Pacific R.R. v. Mingus*, 165 U.S. 413, 435 (1897). *See* Petitioner's Brief at 8.

The 1868 treaty does not explicitly state that the Sac and Fox were to be exempt from state taxes, but neither did the Navajo treaty. *McClanahan*, 411 U.S. at 174. Given the circumstances surrounding the execution of the Sac and Fox Treaty, it should similarly be construed as precluding state taxation of Sac and Fox tribal members in their own territory.

Plainly, the opening of the Sac and Fox reservation in 1891 has implications with respect to assertions of possible Sac and Fox sovereignty over non-members residing in the reservation area. *See Brendale v. Confederated Yakima*

Indian Nation, 492 U.S. 408 (1989); Joseph L. Singer, *Sovereignty and Property*, 86 NW. U. L. Rev. 1 (1991). However, this case concerns only the right of the Sac and Fox people, who work on land held in trust for them by the United States, to "make their own laws and be ruled by them." *McClanahan*, 411 U.S. at 172. Because the income of the Sac and Fox tribal members is "derived wholly from reservation sources," their activities are "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." *McClanahan*, 411 U.S. at 179-80. *See County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 689 n.2 (1992).[12]

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[12] Amici Curiae Arizona, et al., err in two respects when they assert that an Indian must both work *and live* within a reservation to qualify for the *McClanahan* exemption. First, amici curiae miscite their principal authority, which deals with application of state tax laws in Indian country, not just in "reservations." *See Felix S. Cohen's Handbook of Federal Indian Law* 406 (R. Strickland ed. 1982). *Cf.* Brief of Amici Curiae Arizona, *et al.*, at 8 & n. 3. Second, amici curiae then apply the "usual rules" to questions of taxation of Indians. *Id.* at 8-11. The "usual rules" do not apply to such cases, however. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 & n.4 (1985).

In cases involving the taxation of income earned by Indians, only the location of the place of work matters. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (both referring to the Indians' exemption from state taxes on "income from activities carried on within the boundaries of the reservation"). *Cabazon* shows that this exemption applies to income earned in all of Indian country. 480 U.S. at 207 n.5.

2. THE ENABLING ACT

The Court in *McClanahan* also considered the provision of the Arizona Enabling Act which disclaimed "absolute jurisdiction and control" over Indian lands. *McClanahan*, 411 U.S. at 137. Oklahoma made equivalent disclaimers. *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911); Act of June 16, 1906, ch. 3335, 34 Stat. 267-68, 270, 272, 273.

3. PUBLIC LAW 280

The Court in *McClanahan* found that Arizona's failure to amend its constitution pursuant to P.L. 280 to allow its courts to adjudicate civil and criminal matters arising in Indian country "would seem to dispose of this case." *McClanahan*, 411 U.S. at 179. Likewise, Oklahoma chose not to accept the burdens implicit in the acceptance of such jurisdiction. *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990). Thus, like Arizona, Oklahoma has no authority over Indians in Indian country in civil cases,[13] criminal cases,[14] or regulatory matters.[15]

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[13] *E.g., Ahboah v. Housing Auth. of Kiowa Tribe*, 660 P.2d 625 (Okla. 1983) (state courts not authorized to adjudicate forcible entry and detainer action on trust allotment in disestablished reservation); *Housing Auth. of the Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990); *Richardson v. Malone*, 762 F. Supp. 1463 (N.D. Okla. 1991).

[14] *E.g., Cravatt v. State*, 825 P.2d 277 (Okla. Crim. App. 1992); *State v. Klindt*, 782 P.2d 401 (Okla. Crim. App. 1989); *C.M.G. v. State*, 594 P.2d 798 (Okla. Crim. App.), *cert. denied*, 444 U.S. 992 (1979).

[15] *Indian Country U.S.A., Inc. v. Oklahoma*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988). *See* letter (with attached legal analysis) from Robert E. Layton, Jr., Regional Administrator for the United States Environmental Protection Agency, to Mark S. Coleman, Deputy Commissioner for Oklahoma's Environmental Health Services (Sept. 8, 1991), informing Oklahoma of its lack of authority to regulate environmental activties in "Indian country" in Oklahoma; *Washington v. United States Envtl. Protection Agency*, 752 F.2d 1465, 1467 n.1 (9th Cir. 1985).

4. IMPLICATION OF NARROWER STATUTES AUTHORIZING STATE TAXATION OF INDIANS

Oklahoma's position is further weakened by the presence of "narrower statutes authorizing States to assert tax jurisdiction over reservations, . . . explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization." *McClanahan*, 411 U.S. at 177. Some of these narrower statutes address the taxability of Oklahoma Indians. *See, e.g., Choteau v. Burnet*, 283 U.S. 691, 694-95 (1931).

5. THE BUCK ACT

The Buck Act authorized the application of state taxes within "federal areas," but continued the exemption for "any Indian not otherwise taxed." 4 U.S.C. § 109. This exemption protects the Sac and Fox tribal members earning their income in the Sac and Fox Indian country, just as it protected the wage earner in *McClanahan*, who worked on a reservation. *See McClanahan*, 411 U.S. at 177-78.

Indians were not mentioned in the original Buck Act bill, H.R. 6687. 84 Cong. Rec. 10,094 (1939). The Department of the Interior then sought to exclude

"Indian reservations" from the coverage of the bill,[16] and Senator LaFollette proposed an amendment to exempt from the bill "any transaction occurring in whole or in part within an Indian reservation." 84 Cong. Rec. 10,907 (1939).

In hearings on H.R. 6687 in 1940, New Mexico objected to Senator LaFollette's proposed amendment. *Hearings Before a Subcommittee of the Senate Committee on Finance on H.R. 6687* (hereinafter "*Hearings*"), 76th Cong., 3d Sess. 2 (1940). New Mexico Representative Dempsey, on behalf of the New Mexico Governor, acknowledged that Indians were already "exempt from taxation" and emphasized that New Mexico had "no objection whatsoever to prohibiting the sales tax applying to Indians." *Id.* at 19. He explained that New Mexico feared that exempting the reservations themselves would create tax havens for non-Indians who would move their stores to Indian lands. *Id.* He equated "reservations" and "Indian lands" with lands purchased by the federal government for the Indians and other non-taxable land in McKinley County, where, as Representative Dempsey noted, "there are scarcely any lands . . . except for the city of Gallup, that are not Indian lands." *Id.* Much of the Indian land to which Dempsey referred is off-reservation trust allotments. S. Rep. No. 436, 74th Cong., 1st Sess. 3 (1935).

The Interior Department reiterated its position that transactions on Indian reservations be exempted from the bill. *Hearings* at 38-40. Senator George suggested that the Interior officials confer with the State authorities to arrive at acceptable language. *Id.* at 40.

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[16] Letter from Acting Secretary of the Interior to Hon. Pat Harrison (Aug. 1, 1939), *reprinted in* 84 Cong. Rec. 10,685 (1939).

The Committee ultimately reported out the bill with language consistent with New Mexico's position, that "any tax on or from any Indian not otherwise taxed" would continue to be preempted. S. Rep. No. 1625, 76th Cong., 3d Sess. 4 (1940).[17] The Committee amendment was enacted into law *verbatim* and is codified at 4 U.S.C. § 109.

Two things are significant in this legislative history. First, Representative Dempsey's explanation of the situation in McKinley County shows that the exemption from state taxes was understood to apply to off-reservation Indian country. Second, Congress rejected the view that the tax exemption should be confined by formal reservation boundaries and confirmed the long established federal policy of excepting *Indians* from state taxation.

This is the only pertinent legislative history on 4 U.S.C. § 109. Its clear thrust is to affirm that Indians on Indian land are exempt from state taxes. A construction of the Buck Act excepting Indians from state taxes on wages earned within all of Indian country is consistent with the language of the statute, all of the pertinent legislative history, and the traditional canons of construction of statutes intended to benefit Indians. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

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[17] "Indians not taxed" means "those who [hold] tribal relations." *Elk v. Wilkins*, 112 U.S. 94, 112 (1884) (Harlan, J., dissenting). *Cf. id.* at 108 (majority opinion distinguishing for citizenship purposes "Indians not taxed" from those who "have totally extinguished their national fire," have "lost the power of self-government," and who were "never recognized by the treaties or legislative or executive Acts of the United States as distinct political communities").

D. Oklahoma's Terminationist Arguments Implicate Issues Within the Exclusive Authority of Congress.

"For most current purposes, judicial deference to findings of tribal existence is still mandated by the extensive nature of congressional power" in Indian affairs. *Felix S. Cohen's Handbook of Federal Indian Law* 3 (R. Strickland ed. 1982); *United States v. Rickert*, 188 U.S. 432, 445 (1903) ("It is for the legislative branch of the government to say when these Indians will cease to be dependent .... That is a political question, which the courts may not determine."); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866). This Court has consistently held that Indian status is not a racial category, but a political one. *Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). Oklahoma fails to respect this constitutional principle when it argues that "assimilated" Indians are not entitled to the protections of federal law even though they are members of a federally recognized tribe.

When Congress *has* determined that the level of acculturation of an Indian is relevant to his political status, it has established commissions in the Executive Branch to make these determinations. Indeed, the cases on which Oklahoma relies deal with Indians who received "Certificates of Competency" pursuant to such Congressional authority. *E.g., Choteau v. Burnet*, 283 U.S. 690 (1931); *Leahy v. State Treasurer of Oklahoma*, 297 U.S. 420 (1936).[18] *See Elk v. Wilkins*, 112 U.S. 94, 103-06 (1884). Because of Congress' traditional role in this essentially

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[18] *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), allowed state taxation only of cash, securities, and personal property solely for estate tax purposes.

political function, the Court should approach most cautiously a request to rule on the political status of Indians.

If this Court were to accept Oklahoma's argument, courts will be required to define what it is to be an Indian in a wholly new manner. Oklahoma argues that Indians there are generally assimilated enough to warrant removal of traditional tax exemptions.[19] *McClanahan* forecloses such a contention. The Sac and Fox are plainly *not* "Indians who have left *or* never inhabited reservations set aside for their exclusive use *or* who do not possess the usual accoutrements of tribal self-government." *McClanahan*, 411 U.S. at 167 (emphasis added). Like the Shawnees in *The Kansas Indians*, the Sac and Fox government, by virtue of the Oklahoma Indian Welfare Act, is "preserved intact, and recognized by the political department of the government." *Id.* at 169. *See Tenneco Oil Co. v. Sac and Fox Tribe*, 725 F.2d 572, 577 (10th Cir. 1984) ("[T]he Sac and Fox Tribe is possessed of substantial sovereign authority and rights of self-government.") (McKay, J., concurring); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). Nor have the Sac and Fox "left the reservation *and* become assimilated into the general community," a situation where the Indian sovereignty doctrine has been less

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[19] Petitioner's Brief at 13. We do not believe that tribal sovereignty is dependent on an uneducated, impoverished membership. However, even accepting Oklahoma's anachronistic notions of assimiliation, we note that as of 1974 the average grade level achieved by the Sac and Fox was 6th grade, while the Navajo – which Oklahoma characterizes as "unassimilated" – had an average eighth grade education. *Federal and State Indian Reservations and Trust Areas, supra* n.2, at 85 and 473. The educational level of the Sac and Fox stands in sharp contrast to Oklahoma's assertion that the Sac and Fox have "little to distinguish them from all other citizens." Petitioner's Brief at 13.

"rigidly applied." *McClanahan*, 411 U.S. at 171. This case concerns income earned by tribal members working in the Sac and Fox tribal territory, within the area reserved for them by the 1868 Treaty. Any voluntary conferral by Oklahoma of rights, privileges and services to individual Sac and Fox members is irrelevant under *McClanahan*. *Id.* at 172-73 & n.12. *Accord Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 476 (1976).

Oklahoma and its *amici* would disregard *McClanahan* and subject the courts to endless hearings on whether the Indians function as a "reservation community,"[20] and on whether any putative Indian taxpayer is sufficiently educated and assimilated that she might be stripped of her status as a "true" Indian.[21] This position is wholly incompatible with *United States v. John*, 437 U.S. 634, 652-53 (1978). Oklahoma not only would impose an intolerable burden on the courts, it would also defeat the federal policies supporting tribal self-determination. Even in ambiguous instances, the "courts 'are not obliged . . . to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'" *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976), quoting *Santa Rosa*

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[20] *See* Brief of Amicus Curiae United States at 7, 8, 18, 19, 20, 23 & n.20, 24. The United States repeatedly employs, but never defines, the phrases "reservation community" and "coherent reservation community" and the phrases have no basis in prior decisions of this Court. For one to determine that an Indian is a part of a "reservation community," the following facts are sufficient: (1) the United States recognizes the government of the Tribe and (2) the Indian is an enrolled member of that Tribe. The geographical component of a "reservation community" is "Indian country" as defined in 18 U.S.C. § 1151.

[21] *See* Petitioner's Brief at 13-15; Brief of *Amici Curiae* Arizona *et al.*, at 11 n.6; Brief of *Amicus Curiae* United States at 20.

Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).[22]

III. OKLAHOMA'S ATTEMPT TO CIRCUMVENT *MOE* SHOULD BE REJECTED.

A. Oklahoma's Vehicle Excise Tax May Not Be Imposed on Vehicle Transfers Occurring Within Indian Country.

A determinative factor in assessing the validity of Oklahoma's Vehicle Excise Tax on Indian vehicles is the situs of the transaction being taxed. *See Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 163 (1980). If the transaction takes place within the tribal territory the state is without taxing jurisdiction absent congressional authorization. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), *citing McClanahan*. As discussed above, this Court's analysis in *McClanahan* applies throughout Indian country.

Petitioner's Vehicle Excise Tax ignores the situs of the transaction. This Court has recognized that Congress has addressed the business of Indian commerce on reservations so comprehensively "that no room exists for state laws imposing additional burdens upon traders." *Central Machinery v. Arizona Tax Comm'n*, 448 U.S. 160, 164 (1980), *citing Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965). Oklahoma's Vehicle Excise Tax is one

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[22] *See United States v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981) ("Federal policy has sometimes favored tribal autonomy and sometimes sought to destroy it. . . . A degree of assimilation is inevitable under these circumstances and does not entail the abandonment of distinct Indian communities."), *cert. denied*, 454 U.S. 1143 (1982).

such state law for which no room exists when the transfer of legal ownership occurs in Indian country.

B. Oklahoma's Vehicle and License Registration Fee Is an Unlawful Tax on Property Within Indian Country.

The annual registration fee imposed under the Oklahoma Vehicle License and Registration Act is a tax on the value of property held within Indian country and cannot be reconciled with established case law.[23]

Oklahoma is attempting to impose what it refers to as a "fee" of 1¼% of the vehicle's factory delivered price for the first year. Petitioner's Brief at 18. This fee is reduced to ninety percent of the previous year's fee in the following years. Under the guise of a registration fee, Oklahoma effectively imposes a property tax based on value. While Oklahoma chooses to call its property tax a license and registration fee, the nature of the tax must be determined by its operation rather than particular descriptive language which may have been applied to it. *Educational Films Corp. v. Ward*, 282 U.S. 379, 387 (1931).

This Court has refused to allow states to impose taxes on motor vehicles owned by tribal members living on trust lands, regardless of the designation of the tax. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), Washington attempted to impose taxes which were denominated as excise taxes for the privilege of using a vehicle in the state. Each tax was

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[23] For an early case, see, *United States v. Rickert*, 188 U.S. 432 (1903) (invalidating state taxes on, *inter alia*, horses stabled on trust allotments).

assessed annually at a certain percentage of fair market value and imposed on the owners of motor vehicles, including vehicles owned by the Tribe and its members for uses both on and off the reservation. *Colville*, 447 U.S. at 162. The Court previously invalidated Montana's personal property tax as applied to motor vehicles owned by tribal members residing on their reservation, relying on *McClanahan*'s holding that such taxation is " 'not permissible absent congressional consent.' " *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475-76 (1976). Washington's attempt to avoid *Moe* by characterizing its tax as an excise tax rather than as a property tax was rejected by this Court. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 163.

In this instance, Oklahoma's Vehicle and License Registration Fee is a property tax imposed on vehicles owned by Sac and Fox tribal members and garaged in Sac and Fox Indian country. In the absence of Congressional consent, Oklahoma may not impose a property tax and call it a fee and accomplish what *Colville* and *Moe* have prohibited. *Colville*, 447 U.S. at 163; *Moe*, 425 U.S. at 480-81.

CONCLUSION

If lands are validly set apart for the use of the Indians as such, they qualify as a reservation for tribal immunity purposes. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 111 S. Ct. 905, 910 (1991). The Sac and Fox allotments have been validly set aside, as has the tribal trust land. *See United States v. Pelican*, 232 U.S. 442 (1914); *Citizen Band Potawatomi, supra*. The lands at issue here constitute the Sac and Fox Indian country.

State taxation of the income and property of Indians in their Indian country is unlawful absent an act of Congress expressly authorizing such taxation. No such statute exists here. The decision of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

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No. 92-259

(8)

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Supreme Court of the United States

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Petitioner,

v.

SAC and FOX NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, CHITIMACHA INDIAN TRIBE AND SHOSHONE-BANNOCK TRIBES OF THE FORT HALL INDIAN RESERVATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amicus Assiniboine and Sioux Tribes of the Fort Peck Reservation has a 2 million acre Reservation located in four counties of northeastern Montana. The Reservation was allotted and opened to settlement pursuant to the Act of May 30, 1908, ch. 237, § 2, 35 Stat. 558. Today,

approximately 5,800 Indians reside on the Reservation, and Indians comprise more than half of the Reservation's population. About half the Reservation's lands are held in trust by the United States for the Tribes or individual Indians; the other lands are owned in fee, mostly by non-Indians.

Amicus Chitimacha Indian Tribe has a 261 acre Reservation consisting entirely of tribal trust lands located in St. Mary's Parish in southern Louisiana. Approximately 290 Indians reside on this Reservation.

Amicus Shoshone-Bannock Tribes reside on the Fort Hall Indian Reservation in southeast Idaho, which is held by the Tribes under the Fort Bridger Treaty, concluded on July 3, 1868, 15 Stat. 673. Pursuant to Article 2 and 4 of the Fort Bridger Treaty, the Shoshone-Bannocks were guaranteed a homeland by the United States for their exclusive use and benefit. The Reservation encompasses approximately 543,932 acres or 870 square miles. Of the 543,932 acres, 96 percent of the land is tribal land or held in trust by the United States for the benefit of the Tribes or its individual members. The remaining four percent is held in fee by individual tribal members and by non-Indians. Today, there are approximately 3,000 Indians residing on the Reservation.

Amici Tribes neither impose their own income and motor vehicle taxes, nor do they license motor vehicles within their Reservations. In 1981, *amicus* Assiniboine and Sioux Tribes brought suit against, and successfully invalidated, application of Montana's new car tax to tribal members who reside on the Reservation but purchased their vehicle outside the Reservation. *Assiniboine and Sioux Tribes v. State of Montana*, 568 F. Supp. 269 (D.Mont. 1983). The Chitimacha Tribe has entered into a tax compact agreement with Louisiana concerning assessment of state sales and use taxes on motor vehicles owned by the Tribe and

its members who reside on the Reservation. The Shoshone-Bannock Tribes have enacted a possessory interest and severance tax which applies to reservation economic activity.

Amici submit this brief because they believe that controlling decisions of this Court prohibit states from imposing their taxes on income earned or automobiles purchased and garaged by Indian residents of federal Indian country. This tax immunity is of great importance to the Tribes' members, many of whom are poor and cannot afford additional state taxes.

All parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

1. This Court has adopted a *per se* rule barring state taxation of tribes and tribal members on Indian lands except where Congress has clearly authorized such taxes. *E.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *County of Yakima v. Yakima Nation*, 502 U.S. ——, 116 L.Ed.2d 687, 697, 703 (1992). This rule has been held by the Court to prohibit income taxes, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 165 (1973), and state excise and personal property taxes on motor vehicles. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-481 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980).

2. The *per se* rule bars state taxation of Indians in "Indian country," even if the Indian lands on which such Indians reside, earn income or use and garage their motor vehicles are not within a formal "reservation." This Court very recently expressly so held in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. ——, 112 L.Ed.2d 1112, 1121 (1991). Indian country has been defined by Congress to include (a) "all

lands within the limits of any Indian reservation," (b) "all dependent Indian communities," *and* (c) "all Indian allotments." Act of June 25, 1948, ch. 645, § 1, 62 Stat. 757, 18 U.S.C. § 1151. There is no merit to the suggestion of the United States that allotments it holds in trust for Sac and Fox tribal members are not fully shielded from state taxation under the *per se* rule. Even if such allotments are on a diminished reservation, as the United States contends, this Court has already stated in its unanimous decision in *Solem v. Bartlett*, 465 U.S. 463, 467 n.8 (1984), that "federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. *See* 18 U.S.C. § 1151(c)." *Accord: Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 n.48 (1977).

3. Applying the principle that Indian country, rather than reservation, status controls, it is clear that a state cannot tax income earned in Indian country by an Indian who also resides in Indian country. *McClanahan, supra*, at 165, 180-181. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), does not hold otherwise, because the state taxes permitted in that case had been specifically authorized by Congress.

Similarly, this Court's decisions in *Moe* and *Colville* preclude state excise or property taxes on a vehicle used and garaged by an Indian in Indian country. This rule was first applied by the Court to invalidate state personal property taxes on horses, cattle and wagons used by Indians on their allotments on the diminished Sisseton Reservation. *United States v. Rickert*, 188 U.S. 432 (1903). It continues in force to bar the present taxes which, like the ones in *Colville* and *Moe*, are measured by the full value of the property irrespective of its location and use in Indian country. There is no merit to Petitioner's contention that the State should be allowed to tax because it provides services to Indians and constructs

and maintains roads used by Indians. Precisely this argument was rejected in *Moe*, *supra*, at 476, and the *per se* rule has very recently been held by the Court to preclude any such balancing of interests in Indian tax cases. *Yakima*, *supra*, at 703; *Cabazon*, *supra*, at 215, n.17.

ARGUMENT

I. INTRODUCTORY STATEMENT: THIS COURT'S *"PER SE"* RULE BARRING STATE TAXATION OF INDIANS

"In the special area of state taxation of tribes and tribal members" this Court has adopted a "per se" rule under which taxation of Indians residing on Indian lands is permissible "only when Congress has made its intention [to authorize such taxes] . . . unmistakably clear." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (hereafter "*Cabazon*") (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). This rule is as old as the Court's first Indian tax cases in which the Court held that states have no power to tax lands which had been allotted to individual Indians pursuant to a treaty. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) (Since "the tribal organization of the Shawnees is preserved intact . . . they enjoy the privilege of total immunity from state taxation." *Id.* at 755-756). *See also The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). It is as new as this Court's most recent Indian decision last Term in *County of Yakima v. Yakima Nation*, 502 U.S. ——, 116 L.Ed.2d 687 (1992) (hereafter "*Yakima*"), expressly reaffirming this *per se* rule. *Id.* at 697, 703.[1]

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[1] The underpinnings of this *per se* rule are federal recognition of the inherent sovereignty of Indian tribes, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), and protection of tribes from governmental regulation by the states so that tribes can remain "a separate people with the power of regulating their internal and social relations," *United States v. Kagama*, 118 U.S. 375, 382 (1886), with the power to "make their own laws and be ruled by them." *Williams*

Recent and unanimous decisions by the Court have barred imposition of the very types of taxes involved in this case—state income taxes, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 165 (1973) (hereafter "*McClanahan*"), and state excise and personal property taxes on motor vehicles. *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 480-481 (1976) (hereafter "*Moe*"); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980) (hereafter "*Colville*") (unanimous on this point).

II. STATE TAXES CANNOT APPLY TO INDIAN COUNTRY, EVEN OUTSIDE A RESERVATION

Petitioner does not seek to avoid the *per se* rule by contending that any Act of Congress confers upon it the taxing authority it seeks. Rather, Petitioner argues that the *per se* rule only applies to Indians on a "reservation," and it then argues that the Sac and Fox Reservation was disestablished by an 1891 Act of Congress.[2]

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v. Lee, 358 U.S. 217, 220 (1959). Thus, as the Court explained in *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 686-687 (1965), "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference." In sum, as the Court concluded in *Rice v. Olson*, 324 U.S. 786, 789 (1945), "the policy of leaving Indians free from state jurisdiction and control is rooted deeply in the Nation's history."

The *per se* rule against state taxation also furthers modern congressional policies to produce tribal self-determination and economic self-sufficiency, *e.g.*, *Cabazon*, 480 U.S., *supra*, at 219 ("[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members"); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) ("Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development' ") (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)).

[2] Petitioner admits that both the district court and court of appeals "refused to address this issue" of reservation existence, so

It is true that most cases establishing the *per se* rule against state taxation of Indians did refer to Indians residing on a reservation, but that is only because those Indians clearly had a reservation. For example, in *McClanahan*, the Court held that a state income tax cannot be lawfully "applied to reservation Indians with income derived wholly from reservation sources." 411 U.S., *supra*, at 165. By contrast, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (hereafter "*Mescalero*")—

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there is no detailed historical record before this Court about how the Sac and Fox Reservation was allotted and opened to non-Indian settlement. Petitioner's Brief (hereafter "Pet. Br."), p. 6. This Court has often recognized that the continued existence of an Indian reservation depends on the language of the relevant acts of Congress, their legislative history and all circumstances surrounding their passage, including the negotiations with the affected tribe or tribes. *E.g.*, *Solem v. Bartlett*, 465 U.S. 463, 467, 472 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-587 (1977). Similarly, the Court has observed that the extent to which a particular tribe's sovereignty has been altered, divested, diminished or supplanted with state jurisdiction requires "a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions," *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 855-856 (1985).

If this Court should conclude that the existence of the Sac and Fox Reservation is critical to deciding this case, and *Amici* submit it is not, the case should be remanded to the district court to develop a full record on that issue. *Amicus* United States agrees that "[t]he Court might choose to remand for resolution of that issue before addressing the remaining issues in the case," United States' *Amicus* Brief (hereafter "U.S. Br."), p. 9, but alternatively contends that "if the Court chooses to resolve the diminishment issue," it should hold that the Reservation has been diminished. *Ibid.* The United States relies on language in *Solem v. Bartlett*, 465 U.S. 463, 470-471 (1984), that a statute containing language of cession and unconditional promises by Congress to compensate a tribe for land ceded creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." U.S. Br., pp. 10-15. However, a tribe should not be deprived of its reservation without at least the opportunity to develop a record to "surmount" this presumption—if, indeed, the Court concludes that the issue of reservation status is relevant.

decided contemporaneously with *McClanahan*—permitted a state to tax the gross receipts of a tribal ski resort operated on lands the Tribe had leased from the United States Forest Service bordering but "outside the boundaries of the Tribe's reservation." *Id.* at 146. The leased land in *Mescalero* was not held in trust for Indians and was not "Indian country" as defined by 18 U.S.C. § 1151.

Amici submit, however, that the courts below correctly determined that reservation status of the lands in question is irrelevant to determination of this case, because the Sac and Fox lands are held in trust for them by the United States and are Indian country. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. ——, 112 L.Ed.2d 1112, 1121 (1991) (hereafter "*Potawatomi*"), this Court rejected this same petitioner's identical argument: that a "tribal convenience store should be held subject to State tax laws because it does not operate on a formally designated 'reservation,' but on land held in trust for the Potawatomis." *Ibid.* The Court concluded that:

> Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation". Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government." *Id.*, at 648-649; *see also United States v. McGowan*, 302 U.S. 535, 539 (1938).

Ibid.

Potawatomi teaches that tribes and Indians are exempt from state taxation involving activities on Indian trust lands irrespective of whether those lands remain part of a formal reservation. The question is not reservation

status. As the Court held more than a century ago in its first Indian tax decision, it is whether the Indians and the Indian lands on which their activities take place are protected by treaties and laws of Congress:

> As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1867).

Petitioner agrees that: (1) "the Sac and Fox Nation is a federally recognized Indian tribe . . . organized pursuant to the Oklahoma Indian Welfare Act . . ." Pet. Br., p. 2;[3] (2) the Indian employees in question work at "tribal headquarters . . . on a quarter section (160 acres) . . . held in trust by the United States Government for the benefit of the Tribe" *ibid*; (3) this "tribal trust land constitutes Indian country . . . and is within the jurisdiction of the tribal government" *ibid*; and (4) the United States holds various "other tracts of land in trust for the Tribe and its members," totalling about 15,000 acres. *Ibid*; U.S. Br., p. 2. Like the lands in *Potawatomi* and unlike those in *Mescalero*, Sac and Fox tribal and allotted trust lands are Indian country as defined by Congress in a 1948 statute:

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b)

[3] No party or *amicus* challenges the conclusion of the court of appeals that "the Sac and Fox Tribe, like the Navajo in *McClanahan* and the Salish and Kootenai in *Moe*, plainly has not abandoned its tribal organization." *Sac and Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425, 1429, n.4 (10th Cir. 1992). This is, therefore, not a situation where state taxing authority might be permitted because the Indians living on these allotments "do not possess the usual accoutrements of tribal self government," *McClanahan, supra*, at 167.

> all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, *and* (c) *all Indian allotments, the Indian titles to which have not been extinguished*, including rights-of-way running through the same.

Act of June 25, 1948, ch. 645, § 1, 62 Stat. 757, 18 U.S.C. § 1151 (emphasis added).

In this 1948 Indian country statute, Congress set the extent of federal preemption of state law, and thus, in the special area of taxation, the scope of the *per se* rule. The United States as *amicus curiae* argues that an Indian is exempt from state taxation only on Indian reservation lands—§ 1151(a)—but not necessarily on other Indian country lands—such as trust allotments located on a disestablished reservation—although these are also declared to be Indian country in § 1151(c). U.S. Br., pp. 16-20. But there is no basis for concluding that Congress intended such a difference. Indeed, contrary to the United States' position, this Court has already concluded that:

> *Regardless of whether the original reservation was diminished*, federal and tribal courts have *exclusive* jurisdiction over those portions of the opened lands that were and have remained Indian allotments. *See* 18 U.S.C. § 1151(c).

Solem v. Bartlett, 465 U.S. 463, 467 n.8 (1984) (hereafter "*Bartlett*") (emphasis added).[4] Similarly, in *Rose-*

[4] It would be curious indeed if the law were otherwise. Under the United States' argument, an Indian on fee lands owned by others within an undiminished reservation would be under exclusive federal and tribal jurisdiction, but an Indian on his or her own trust allotment on a diminished reservation could be subject to state law.

Although Section 1151 appears in the federal criminal code and "is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of federal and tribal civil jurisdiction." *DeCoteau v. District County*

bud Sioux Tribe v. Kneip, 430 U.S. 584, 615 n.48 (1977) (hereafter "*Rosebud*"), the Court stated that "to the extent that members of the Rosebud tribe are living on allotted land outside of the Reservation, they, too, are on 'Indian country' within the definition of 18 U.S.C. § 1151 and hence subject to federal provisions and protections."

The United States would complicate what is really a simple determination—whether an event occurs in Indian country—by proposing that an Indian residing on an allotment on a diminished reservation is exempt from state taxation *only* if there is also a "reservation community." U.S. Br., pp. 17-18. Apart from ignoring this Court's statements in *Potawatomi* and *Bartlett*, *supra*, the United States would collapse the three categories of Indian country contained in Section 1151—(1) reservation lands, § 1151(a), (2) "dependent Indian communities," § 1151(b), and (3) "all Indian allotments," § 1151(c)—into two. That would rewrite Section 1151 to define Indian country as (a) "all land within the limits of any Indian reservation," or (b) "all Indian allotments" that are *also* within "dependent Indian communities." Congress could of course have done this, but it did not.

Thus, under Section 1151 an Indian is exempt from state authority on an allotment whether or not it is within a reservation, 18 U.S.C. § 1151(c), *Bartlett*, *supra; Rosebud*, *supra*. In addition, an Indian is also subject to exclusive federal and tribal authority and exempt from state authority in a "dependent Indian community," even if that community is outside a reservation and not located on any Indian allotments. *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982); *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *State v. Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 444 U.S. 1098 (1980).

Court, 420 U.S. 425, 427, n.2 (1975); *see also Cabazon*, *supra*, at 207, n.5; *McClanahan*, *supra*, at 181 ("state is totally lacking in jurisdiction over both the people and the lands it seeks to tax.").

III. STATES CANNOT APPLY INCOME OR MOTOR VEHICLE EXCISE OR PROPERTY TAXES TO INDIANS WHO RESIDE IN INDIAN COUNTRY, AND EARN THEIR INCOME OR GARAGE THEIR VEHICLES IN INDIAN COUNTRY

Once it is recognized that the "Indian country," rather than reservation, status of the lands controls, resolution of this case should proceed by straightforward application of the *per se* rule and this Court's prior recent decisions.

A. Income Taxes

McClanahan precludes Oklahoma from imposing a tax on income earned in Indian country by an Indian who also resides in Indian country.[5] Petitioner's contention that *McClanahan's* bar to income taxation only applies to a solid tract of reservation land like "the 7.6 million acre Navajo Reservation" is clearly wrong. Pet. Br., p. 14. This Court's *Moe* decision barring state taxation of motor vehicles owned by Indians[6] involved a reservation which had been allotted and opened to settlement by non-Indians, where slightly over half of its 1.25 million acres is now owned in fee and where tribal members comprised "19% of the total reservation population." 425 U.S., *supra*, at 466.[7] *Yakima* and *Colville* also involved

[5] Where an Indian tribal employee resides outside of Indian country, *Amici* believe whether the state may validly apply its tax (so long as it also taxes other state residents who earn income in other jurisdictions) depends on whether the state tax interferes with the tribal employer's administration of its governmental affairs. Compare U.S. Br., pp. 20-23.

[6] In *Moe*, the Indian plaintiffs had originally challenged Montana's personal income tax. Shortly after *McClanahan*, "the State stipulated that *McClanahan* barred its taxing jurisdiction in this respect." 425 U.S., *supra*, at 469, n.8.

[7] As this Court observed in *Moe*, *supra*, at 466-467, the district court in that case found that:

> The Flathead Reservation is a well-developed agricultural area with farms, ranches and communities scattered throughout the inhabited portions of the Reservation. While some towns have predominantly Indian sectors, generally Indians and non-Indians live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.
>
> As Montana citizens, members of the Tribe are eligible to vote and do vote in city, county and state elections. Some hold elective and appointed state and local offices. All services provided by the state and local governments are equally available to Indians and non-Indians. The only schools on the Reservation are those operated by school districts of the State of Montana. The State and local governments have built and maintain a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction.

[8] Some observations the Court made about Oklahoma tribes in 1943 are no longer completely accurate today, five decades later. The policy of Congress since the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501 *et seq.*, has been to strengthen tribal self-government in Oklahoma. Implementation of this Act and of

reservations that had been allotted and opened to non-Indian settlers. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 415, 422 (1989); *Seymour v. Superintendent*, 368 U.S. 351, 354-358 (1962). As noted, the earliest decision of this Court precluding the state taxation of Indains involved a reservation that had been subject to a treaty surrendering some lands for sale to non-Indians and allotting others to tribal members. *The Kansas Indians*, 72 U.S. (5 Wall.), *supra*, at 757.

Petitioner also relies upon *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), as somehow exempting Oklahoma tribes from the *per se* rule. Pet. Br. pp. 13-14, 20. While this Court's closely divided decision in *Oklahoma Tax Comm'n* did uphold application of state estate taxes to some restricted funds held by the United States for the benefit of members of the Five Civilized Tribes, that state taxing authority *was pursuant to a specific statutory grant.* Act of January 27, 1933, 47 Stat. 777, ch. 23; 319 U.S. *supra* at 604-606.[8]

B. Motor Vehicle Excise and Property Taxes

As noted above, both *Moe* and *Colville* involve reservations which, like the Sac and Fox, had been allotted and opened to non-Indian settlement. So long as a Sac and Fox Indian resides in Indian country (i.e., on a trust or restricted allotment) and uses and garages his or her car there, *Moe* and *Colville* teach that a state may not impose a tax on that vehicle, whether it is denominated a property or excise tax.[9]

This Court first invalidated state taxes on personal property used by Indian allottees on their lands in *United States v. Rickert*, 188 U.S. 432 (1903) (hereafter "*Rickert*"). *Rickert* involved trust allotments on the "former Sisseton Indian Reservation" in South Dakota, *id.* at 433; *see DeCoteau v. District County Court*, 420 U.S. 425 (1975). This Court held that state taxation of improvements or personal property used on these trust allotments would frustrate the policy of Congress in the Allotment Acts. *Rickert*, *supra*, at 442-443.

The personal property held exempt from state taxes in *Rickert*, appropriate to the "horse and buggy" days of

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modern federal Indian policies of tribal self-determination and economic self-sufficiency, such as contained in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*, have revitalized Oklahoma tribal governments, which today administer millions of dollars of federal programs and services annually, run schools and have active and functioning tribal courts. *E.g., Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). The State concedes that the Sac and Fox are today a functioning tribal government, Pet. Br., p. 2, as are other Oklahoma tribes such as the Potawatomi—or else they would not have been determined by this Court to possess tribal sovereign immunity in *Potawatomi*, *supra*, p. 8.

[9] *Amici* takes no position on whether *Moe* permits a state to impose a nondiscriminatory registration fee, such as Oklahoma's flat $15 fee in this case, on Indians residing in Indian country who register their vehicles with the State. *See Moe*, 425 U.S., *supra*, at 469 and n.9.

1903, was horses, cattle and wagons, *id.* at 433, 443, not motor vehicles. Similar taxes on motor vehicles did not come before the Court until 1976, when a unanimous Court invalidated a state "personal property tax which was . . . a condition precedent for lawful registration of the vehicle . . . imposed on reservation Indians." *Moe*, *supra*, at 469. The Court in *Moe* specifically rejected the State's arguments that it should be allowed to tax Indians residing on reservations because the reservation had been opened to non-Indian settlement and the Indians had received allotments, because Indians "benefitted from expenditures of state revenues for education, welfare, and other services . . . [and] had the right to vote and to hold local and state office . . . ," or because "the Indian and non-Indian residents within the reservation were substantially integrated as a business and social community." *Id.* at 476.

The Court similarly held that states may not impose their full vehicle excise taxes on Indians when the vehicles are used both on and off an area protected from state taxation by federal law. *Colville*, *supra* at 162-164. In *Colville*, the Court observed that the taxes were "[e]ach denominated an excise tax for the 'privilege' of using the covered vehicle in the state, each is assessed annually at a certain percentage of fair market value, and each is sought to be imposed on vehicles . . . used both on and off the reservation." *Id.* at 162. The Court in *Colville* used *Moe* as its "departure point," explaining that in *Moe* "the tax was assessed annually as a percentage of market value of the vehicles in question." *Id.* at 163. It rejected the State's argument that "the taxable event is the use *within the State* of the vehicle in question," *ibid.* (emphasis in original), and held that "more than mere nomenclature" was required to avoid the bar of *Moe*. *Id.* at 164.

The teaching of these cases is that if the vehicle is garaged and used within Indian country, it is insulated

from the state tax, whether labeled a personal property or excise tax. As in *Rickert* and *Moe*, the place of use of the personal property, not its place of purchase, controls. Doubtless, at least some of the horses, cattle and wagons in *Rickert* and motor vehicles in *Moe* and *Colville* were purchased outside Indian country. Yet all three cases invalidated both property and excise taxes measured by the full value of the property where that property was used in Indian country.

By contrast, the Court in *Colville* observed that a state "may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles . . . tailored to the amount of actual off-reservation use. . . ." 447 U.S., *supra*, at 163. But like the states involved in *Moe* and *Colville*, Oklahoma here seeks to impose *its entire* annual property tax and excise tax on vehicles owned by an Indian residing in Indian country, measured by the value of the vehicle,[10] irrespective of where the car is used. It does not seek to apportion the taxes between use of the vehicle inside or outside of Indian country. These are *exactly* the kind of taxes forbidden by the *per se* rule.

Petitioner also contends that its motor vehicle taxes should be sustained because "the state has a greater interest in the revenues than the Tribe" and the Tribe and its members receive "state services because all roads in Oklahoma are constructed and maintained by the State and the Tribe provides none of these services." Pet. Br.,

[10] As the court of appeals below found:

> The State of Oklahoma imposes two motor vehicle taxes. The first is the Vehicle Excise Tax calculated at three and one-half per cent of value and imposed upon transfer of legal ownership. The second tax is the annual registration fee imposed on every vehicle operated upon, over, along, or across any avenue of public access within Oklahoma. This tax is imposed in lieu of a personal property tax on automobiles.

Sac and Fox Nation, 967 F.2d, *supra*, at 1430. This annual registration fee in lieu of a personal property tax is $15, plus 1¼% of the vehicle's value. U.S. Br., p. 3.

pp. 5, 19-21. Precisely this argument was rejected in *Moe*, *supra* at 466-467, 476, and in any event the *per se* rule precludes any such balancing of interests here. As the Court stated in *Cabazon*:

> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.

480 U.S., *supra*, at 215, n.17. This holding was very recently reaffirmed in *Yakima*:

> [W]e have traditionally followed "a per se rule" [i]n the special area of state taxation of Indian tribes and tribal members. Though the rule has been most often applied to produce categorical prohibition of state taxation when there had been "no cession of jurisdiction or other federal [legislative permission]," *Mescalero Apache Tribe*, 411 U.S., at 148, we think it also applies to produce categorical allowance of state taxation when it has in fact been authorized by Congress. "Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress." *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S., at 177, (opinion of Rehnquist, J.).

116 L.Ed.2d, *supra*, at 703.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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Dated: January 21, 1993

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No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

SAC AND FOX NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICI CURIAE* OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE ROSEBUD SIOUX TRIBE, THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD INDIAN RESERVATION, *et al.* IN SUPPORT OF RESPONDENT

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(additional *amici* list on inside cover)

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are six federally recognized Indian tribes, one tribal tax commission, and one national Indian organization.[2] *Amici* have a substantial interest in the issue raised in

[1] Counsel for Petitioner and counsel for Respondent have consented to the filing of the brief of *amici*. The consents are submitted for filing herewith.

[2] The National Congress of American Indians (NCAI) is the oldest and largest national organization of Indian governments and individuals in

this case. The issue involves the scope of a fundamental doctrine of Indian law – the right of Indian tribes and their members to be free from state jurisdiction under federal law.

Amici tribes currently exercise their sovereign authority over their Indian lands, including lands held in trust by the United States for the tribe and lands allotted by the United States to individual members of the tribe and held in trust for the members. They do so under decisions of this Court and under statutes of the United States Congress confirming their sovereign rights.

The State of Oklahoma in this case concedes that Indian tribes have the right to so exercise their sovereign powers on such lands. And the State concedes that, by virtue of tribal sovereignty and federal law, tribes and their members generally would be immune from state jurisdiction on land which has been formally designated as an Indian reservation.

Notwithstanding these concessions, however, the State of Oklahoma is attempting to tax the income of members of the Sac and Fox Nation who work for the Tribe on tribal trust land but who do not live on that land. The State is also attempting to impose certain motor vehicle taxes and license and registration fees on the personal motor vehicles of tribal members. The State's theory is that the situation of the Sac and Fox Nation – and presumably those of the other 30-some Indian Nations in Oklahoma – is different because the bulk of its lands has been allotted and is held in trust for tribal members.

Amici vehemently oppose the State's exercise of jurisdiction in this case and the State's theory for the exercise of such jurisdiction. The exercise of state jurisdiction over tribal members on Indian lands significantly threatens the inherent rights, confirmed in treaties with the United States and promoted under current federal policy, of all Indian tribes to be

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the United States. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, to enlightening the public toward a better understanding of Indian people, and to preserving rights under Indian treaties and agreements with the United States.

self-governing and free from state jurisdiction within Indian territory. *Amici* urge this Court to adhere to the longstanding principles expressed in its cases that these rights are properly applicable to both tribal trust land and allotted lands such as are involved here.

SUMMARY OF ARGUMENT

Absent express consent of Congress, a state cannot exercise jurisdiction over Indians in Indian territory. This Court has long protected the immunity of Indians in Indian territory from unauthorized state jurisdiction. The Court's continued protection is particularly warranted where, as here, without relying on any express statutory provision, the State seeks to tax the income of tribal members who work for the Tribe on land held in trust for the Tribe. The State's demand for a rule that requires the tribal members also to live on the tribal trust land is a specious argument that should be rejected by this Court.

Alternatively, assuming *arguendo* that residency in Indian territory is a prerequisite to the application of the Indian immunity doctrine, cases of this Court establish that at least those tribal members who live on trust allotments are protected from state jurisdiction here. The cases and federal statutes have long determined that trust allotments, having been validly set apart for the Indians' use and being subject to federal protection, are the equivalent of formal Indian reservations and other tribal trust land for purposes of the Indian immunity doctrine. Again, the State points to no express provision of Congress otherwise. A review of allotment and cession acts of the late nineteenth century such as are involved in this case confirms that, notwithstanding allotment in severalty of tribal lands to individual tribal members, Indian immunity from state jurisdiction was intended to be preserved on the trust allotments.

The State's fallback arguments, that the reservation boundaries in this case have been disestablished, and that Indian tribes and lands in Oklahoma are somehow different from those elsewhere, are meritless. This Court quite recently

treated an Indian tribe in Oklahoma the same as other tribes for purposes of the very immunity doctrine at issue here. Other cases of the Court firmly establish that questions of boundary disestablishment are irrelevant to issues of jurisdiction over tribal trust lands and trust allotments. Hence, the lands in this case are protected by the Indian immunity doctrine.

The United States as *amicus curiae* in this case advances a novel "hybrid" theory – that Indian activities on allotted lands within a former reservation area are presumptively subject to both tribal jurisdiction *and* state jurisdiction, unless the tribal members have maintained a "reservation community" sufficient to oust state jurisdiction. Such a theory is not only unprecedented it is contrary to decisions of this Court and congressional enactments which have long equated trust allotments with reservations and tribal trust land for jurisdictional purposes.

Efforts by states to tax and regulate tribal Indians similar to the State's efforts here have been soundly rejected by this Court. The same result is called for here. Accordingly, the State's asserted jurisdiction must fail on the grounds that it is preempted by federal law or, alternatively, that it infringes on the conceded right of Indian tribes to make their own laws and be ruled by them.

ARGUMENT

I. FEDERAL LAW BARS THE STATE FROM TAXING INCOME EARNED BY TRIBAL MEMBERS FOR WORK DONE FOR THE TRIBE ON TRIBAL TRUST PROPERTY

A fundamental doctrine of federal Indian law is that land set aside for Indians is territory over which Indian tribes are self-governing and from which state jurisdiction is generally excluded. *See generally McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168-171 (1973). This doctrine of Indian immunity is based on the separate sovereign status of Indian tribes and the ensuing federal-tribal relationship manifested in treaties and other federal law and policy. *Id.* at 168-69. The

doctrine has been ingrained in decisions of this Court since *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Most recently the Court noted that Congress' exemption of Indians from state jurisdiction on Indian lands is grounded in its constitutional authority under the Commerce and Treaty Clauses. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, ___ U.S. ___, 112 S.Ct. 683, 687 (1992).

This "deeply rooted" Indian immunity doctrine applies forcefully in the area of taxation. *McClanahan*, 411 U.S. at 168. Indeed, this Court has held repeatedly that Indian tribes and individuals are "per se" exempt from state taxation in their territory. *County of Yakima*, 112 S.Ct. at 692.[3] While Congress can authorize state taxation of the activities and property of Indians, it must do so with "unmistakably clear" intent. *Id.* at 688.[4] A state's right to tax Indians in Indian territory will not be lightly inferred by the courts. *Id.*

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[3] Petitioner Oklahoma Tax Commission (hereinafter "the State") fails to appreciate that the Indian immunity doctrine protects *both* Indian tribes and individual tribal members. The State seemingly characterizes the doctrine as applying only to instances where a state is directly regulating an Indian tribe. State's Op. Br. at 7. The State (and the United States, Br. of U.S. as *Amicus Curiae* at 18) relies on this Court's decision in Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 111 S.Ct. 905 (1991), for its proposition but that reliance is misplaced. A tribe was involved in that case. But it is a *non sequitur* to suggest that therefore the doctrine applies only to tribes. To regulate tribal members in Indian territory necessarily implicates the tribe, whose right it is to regulate them. The state may not do so. *See, e.g., McClanahan*, 411 U.S. at 168-71 (state cannot tax personal income of Indian individual); Bryan v. Itasca County, 426 U.S. 373 (1976) (state cannot tax personal property of Indian individual); *see also* Section B of this Part of this Brief, regarding infringement on tribal self-government.

[4] In light of these principles, the State's point, State's Op. Br. at 7-8 and 10-11, that, in holding that the state taxes here are unauthorized, the Court of Appeals below incorrectly failed to rely on a specific federal statute, is wrong. The starting point for the analysis of whether a state has jurisdiction over Indians in Indian territory is the Indian immunity doctrine,

The Indian immunity doctrine, like similar sovereignty-based doctrines, has a significant territorial basis. In *Worcester v. Georgia*, the Court noted that Congress has always:

> [M]anifestly consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

31 U.S. at 555. The principle that territory provides the basis for the application and exercise of many Indian rights has endured.[5] "The Court has repeatedly acknowledged that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption [of state jurisdiction] inquiry." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980). In essence, part of the preemptive force behind the Indian immunity doctrine is the reserving or setting apart by Congress of territory for Indians.

This Court aptly recognized this principle in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905 (1991). *Citizen Band Potawatomi* held that, absent express congressional intent otherwise, activities between an Indian tribe and tribal members on a parcel of land held in trust for the tribe are immune from state jurisdiction. 111 S.Ct. at 910. The State there argued vigorously that the tribal trust land was not a formal

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which is essentially a presumption that the state lacks jurisdiction. *County of Yakima*, 112 S.Ct. at 688 and 692. The burden is then on the state to show that Congress has expressly authorized state jurisdiction. *Id.* By arguing that tribes must show in the first instance a federal law ousting state jurisdiction, the State here perverts the applicable test. *McClanahan*, upon which the State relies for its preemption argument, specifically recognizes the rule against state taxation without express congressional authority. 411 U.S. at 170-71.

[5] *But cf., e.g.*, Menominee Tribe v. United States, 391 U.S. 404 (1968) (Indian treaty hunting and fishing rights survive congressional act terminating tribal status and reservation).

Indian reservation. In rejecting that argument as being dispositive of the immunity issue, the Court stated:

> Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634 [] (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' . . . Here . . . the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*, we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes.

112 S.Ct. at 910 (some citations omitted).[6]

The income of tribal members at issue in this case is earned at least principally if not wholly on land held in trust for the Sac and Fox Nation (hereinafter "the Tribe").[7] While the United States argues, Br. of U.S. as *Amicus Curiae* at 17-18, that in *McClanahan* it was important that the individual Indian resided on the reservation, the authority for that

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[6] The "validly set apart" rule as it pertains to tribal lands has long been established, regardless of whether such lands are part of a formal reservation. *See, e.g.*, United States v. John, 437 U.S. 634 (1978) (parcel of tribal trust land); Mattz v. Arnett, 412 U.S. 481 (1973) (undisposed-of ceded land restored by Congress to tribal ownership); United States v. McGowan, 302 U.S. 535 (1938) (lands purchased out of federal funds and occupied by tribe); United States v. Sandoval, 231 U.S. 28 (1913) (lands of Pueblo tribes held in fee); Donnelly v. United States, 228 U.S. 243 (1913) (executive order tribal lands); Bates v. Clark, 95 U.S. 204 (1877) (lands in original Indian title); *and see generally* F. Cohen, *Handbook of Federal Indian Law* 27-41 (1982 ed.).

[7] It is common ground that there was never a cession of the tribal trust land in this case. State's Op. Br. at 2; Br. of U.S. as *Amicus Curiae* at 11.

position is unclear. There is no sign in *McClanahan* that the case turned on residency. Residence was relevant there as an indication that the case did not involve "Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government." 411 U.S. at 167. Where, as here, there is a fully functioning tribal government hiring tribal members to work on tribal trust land, the necessary assurances are present that assimilated Indians are not involved.[8] The State acknowledges the Tribe's right to self-government here, as this Court did for a similarly situated tribe in *Citizen Band Potawatomi*.[9] There is thus no principled way of distinguishing this case from *McClanahan* regarding the income tax and hence that tax is invalid.[10]

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[8] These factors make application of the Indian immunity doctrine reasonable notwithstanding hypothetical residence of tribal members in Oklahoma City. *See* Br. of U.S. as *Amicus Curiae* at 18-19. And, while Ms. McClanahan did reside on a reservation, she apparently did not work for the Tribe, making the present case even stronger.

[9] The State, however, also argues that it has "assumed the burden" of being the government primarily responsible for the welfare of Indians in Oklahoma. State's Op. Br. at 11 and 13. This self-actualizing theory is plainly at odds with decisions of this Court which hold that only Congress can grant a state jurisdiction over Indians in Indian territory, *e.g.*, Fisher v. District Court, 424 U.S. 382 (1976), as well as with modern federal Indian law and policy, *e.g.*, Public Law 280 of 1953, *as amended*, 25 U.S.C. §§ 1321-23 (providing, *inter alia*, that states can only assume jurisdiction over Indians under Public Law 280 with consent of Indian tribe).

[10] The argument advanced by the *amici* states does not compel a conclusion otherwise. Br. of States as *Amicus Curiae* at 8-11. The states point out that, outside the area of Indian law, where an individual resides in one state but works in another, as a general rule both states are entitled to tax the individual's income. However, the states cite no authority for the proposition that this rule applies in an Indian law setting. Indeed, this Court has cautioned that the "unique historical origins of tribal sovereignty make it generally unhelpful" to apply the rules of non-Indian law to an Indian law setting. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). "Tribal reservations are not States. . . . The tradition of Indian sovereignty over the reservation and tribal members must inform the

II. IF RESIDENCY IS A FACTOR, THE COURT OF APPEALS CORRECTLY HELD THAT THE STATE IS BARRED BY FEDERAL LAW FROM TAXING OR OTHERWISE EXERCISING JURISDICTION OVER TRIBAL MEMBERS ON ALLOTTED LANDS

A. This Court And Congress Have Consistently Treated Allotted Lands Like Formal Indian Reservations And Other Tribal Trust Lands; Hence, The Federal Indian Law Doctrine Of Indian Immunity From State Jurisdiction Applies To The Activities Of Tribal Members On Allotted Lands

As *amici* have shown, the Indian immunity doctrine is a fundamental general principle of Indian law.[11] Without a doubt it would apply to oust the state regulation of tribal members at issue here if the Tribe's lands were a formal Indian reservation. State regulation, however, also is ousted even though some of the Tribe's lands have been allotted and are held in trust for tribal members.[12]

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determination whether the exercise of state authority has been pre-empted by operation of federal law." *Id.*

[11] Another principle applicable here is that the principles of Indian law typically apply across the board to all tribes (and all states), notwithstanding the fact that the United States historically often treated only with particular tribes or groups of tribes. *See generally* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983) (discussing breadth of Indian law preemption rules). Thus, despite the State's argument otherwise, State's Op. Br. at 7 & 10-11, the gist of *McClanahan* was not that there were "specific" provisions of the Navajo Tribe's treaty that determined the outcome in that case. *McClanahan* does not hold nor should it be read to hold that the Navajo Tribe and only the Navajo Tribe is entitled to the Indian immunity doctrine. Rather, *McClanahan* stands for the principle that the Indian immunity doctrine generally and presumptively applies in Indian territory unless Congress expressly provides otherwise.

[12] The *amici* states in support of the State in this case argue that decisions of this Court, namely, *McClanahan* and Williams v. Lee, 358 U.S. 217 (1959), conclusively resolve the issue of state jurisdiction over

1. Under a long line of cases from *United States v. Pelican* to *Citizen Band Potawatomi*, the test for territory to which the Indian immunity doctrine applies is whether the land has been validly set apart for the Indians and is subject to federal protection, and trust allotments meet that test

The allotted lands here are concededly within the area once set apart as a reservation for the Tribe.[13] A "validly set apart" rule similar to the rule affirmed in *Citizen Band Potawatomi* for tribal lands has been applied to such allotted lands. Hence the State's argument that allotted lands are not

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tribal members on allotted lands in their favor. Br. of the States as *Amicus Curiae* at 4-7. Their argument is based on the appearance of the terms "Indian reservation" and "reservation Indians" in the decisions. Taking this language literally, the states argue that in the absence of a formal reservation, tribal members are automatically subject to state jurisdiction.

The states clearly overstate the use of these terms, especially in light of *Citizen Band Potawatomi*. In addition, some cases simply refer to the rule as being that against state taxation of "tribal members" or "Indian individuals" without using the term "reservation." *E.g., County of Yakima*, 112 S.Ct. at 692; Montana v. Blackfeet Tribe, 471 U.S. 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142. Other cases such as Ramah Navajo School Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 834 (1982), which found preemption of a state tax on a non-Indian company, involved tribal trust and allotted land. In any event, the *amici* states merely beg the question presented in this case of whether allotted lands are the equivalent of a reservation for purposes of the jurisdictional assertion here.

[13] The State in this case argues that the boundaries of the Sac and Fox Reservation were "disestablished" by the Allotment and Cession Agreement between the Tribe and the United States which was ratified by the Act of February 13, 1891, 26 Stat. 749. State's Op. Br. at 6-10. *Amici* express no opinion in this Brief on the merits of the disestablishment issue. Such an opinion is unnecessary because, as we show in Part III of the Brief, the issue of boundary disestablishment is irrelevant as a matter of law to questions of jurisdiction over tribal and allotted lands held in trust which are within the original boundaries.

entitled to application of the Indian immunity doctrine must fail here as it did in *Citizen Band Potawatomi*.

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Court stated that "Indian allotments, the Indian titles to which have not been extinguished," are subject to federal and tribal jurisdiction. 420 U.S. at 427 n.2. "It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities." *Id.* at 428. And the Court explained why. Noting that the tribe in *DeCoteau* had, in an Allotment and Cession Agreement similar to that of the Tribe's here, ceded all lands except those allotted to tribal members, the Court stated:

> But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the Government were satisfied that *retention of allotments would provide an adequate fulcrum for tribal affairs*.

Id. at 446 (emphasis added), *citing United States v. Pelican*, 232 U.S. 442 (1914).[14]

United States v. Pelican involved jurisdiction over allotted lands on the Colville Indian Reservation. The Court there stated the following:

> [T]he original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. The same considerations, in substance, apply to the allotted lands. . . . The allottees were permitted to enjoy a more secure tenure, and

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[14] In the next subsection of this Brief, *amici* will show how the Court's statement about allotted lands being an "adequate fulcrum for tribal affairs" follows directly from the instructions of the Department of the Interior to the federal commissions that negotiated the allotment and cession agreements with the tribes. The commissioners were told, notwithstanding the cessions extracted from the tribes, to leave the tribes with some form of a land base over which they could continue their tribal relations, whether that be diminished reservations or allotted lands.

> provision was made for their ultimate ownership without restriction. But, meanwhile, the lands remained Indian lands, set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings. . . .

232 U.S. at 449 (citations omitted).

In *United States v. Rickert*, 188 U.S. 432 (1903), the state was taxing the improvements and personal property of tribal members on allotted lands located within the original boundaries of the Sisseton-Wahpeton Sioux Reservation, the same reservation involved in *DeCoteau*. Twelve years after the reservation had been, as this Court held in *DeCoteau*, "terminated" by the allotment and cession act, the Court struck down those taxes, reasoning that as long as the allotted lands were held in trust, the state was without power to tax absent congressional authority otherwise. 188 U.S. at 437. While the Court at the time of *Rickert* viewed the allotted lands as a "federal instrumentality," the Court also relied on federal Indian policy and cited to several Indian law cases for its holding. *Id.* at 437-39. And, importantly for purposes of this case, the Court saw the allotted lands as being no different from other Indian lands, such as reservations and tribal trust lands, which it also viewed as federal instrumentalities. *Id.* at 441.

DeCoteau, *Pelican*, and *Rickert* make clear that, at least regarding the application of the Indian immunity doctrine, allotted lands are the equivalent of reservations and other tribal trust lands. *See also Solem v. Bartlett*, 465 U.S. 463, 468 (1984) (noting that this Court historically has defined Indian lands as including all lands in which "the Indians held some form of property interest," including tribal trust lands and "individual allotments"). Like reservation and tribal lands, allotted lands have been validly set apart for the Indians' use and are subject to federal protection. In other words, they are Indian trust lands. The fact that they are held in trust for individual tribal members rather than the tribe is simply irrelevant for jurisdictional purposes.

Congress has long adhered to this view. In 1948, Congress enacted the Indian Country Statute, 18 U.S.C. § 1151. It provides in pertinent part:

> [T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151.[15]

Section 1151 was the first comprehensive definition by Congress of the geographic territory over which federal and tribal jurisdiction is permitted and from which state jurisdiction is generally excluded. Like reservations and other Indian areas, allotted lands expressly are within that definition because, in Section 1151, Congress was essentially codifying the validly set apart test of this Court. Indeed, the State does not argue that the allotted lands here are not within the statutory definition of Indian country.[16]

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[15] Although Section 1151 is contained in the federal criminal code, this Court has held that "[t]his definition applies to questions of both criminal and civil jurisdiction." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987), *citing DeCoteau*, 420 U.S. at 427 n.2. *DeCoteau* in fact was a case involving questions of both criminal and civil jurisdiction. *Id.* at 430-31.

[16] The United States concedes in this case that allotted lands are within the statutory definition of Indian country at least for purposes of criminal jurisdiction. Br. of U.S. as *Amicus Curiae* at 17. The United States argues, however, that the allotted lands are not a "reservation" as that term is used in federal Indian statutes. *Id.* at 12. In support of this argument, the

Other statutes make clear that Congress equates allotted lands with reservation and other tribal lands for purposes of

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United States relies on an Opinion of the Secretary of the Department of the Interior, 59 Op. Interior Dep't. 1 (1945), which in turn relies on this Court's decision in United States v. Oklahoma Gas & Elec. Co., 318 U.S. 206 (1943).

That argument misses the point. While both the Interior Department Opinion and *United States v. Oklahoma Gas & Elec. Co.* determine that allotted lands are not a "formal reservation" within the meaning of certain federal rights-of-way statutes, they do not reach the issue of whether the allotted lands are nevertheless land over which the principles and doctrines of Indian law apply. The Tribe here need not argue that allotted lands are a formal reservation since, under pertinent cases such as *Pelican* and *Citizen Band Potawatomi*, that is not the test.

It is curious, however, that in *Citizen Band Potawatomi*, a civil case involving application of the Indian immunity doctrine, the United States argued that "allotments within the original reservation boundaries that are still held in trust are 'Indian country' under 18 U.S.C. § 1151(c), and are therefore subject to the jurisdiction of the United States and the Tribe, rather than the State." Br. of U.S. as *Amicus Curiae* (*Citizen Band Potawatomi* case) at 26 n.20.

In this case, the United States advocates – for the first time ever – that the test for application of the Indian immunity doctrine in cases involving allotted lands is whether the tribal members have maintained a "reservation community." Br. of U.S. as *Amicus Curiae* (*Sac and Fox* case) at 18-20. Not only does the United States fail to explain its inconsistent positions, it cites no authority for the origin of this reservation community test.

Nor does the United States explain why, in light of the express inclusion of allotted lands in Section 1151(c), a separate test such as the showing of a reservation community is necessary to resolve jurisdictional issues on allotted lands. Such a test would merely provide a means by which, if the test is met, tribal members on allotted lands are entitled to no more than that which they already have under Section 1151(c). Also, 1151(c) would not have any independent meaning if the allotments must be within a reservation to be entitled to jurisdictional immunity. Section 1151(a) already makes all land within a reservation Indian country. *See DeCoteau*, 420 U.S. at 429 n.3 (Section 1151(c) "contemplates that isolated tracts of 'Indian country' may be scattered checkerboard fashion over a territory otherwise under state jurisdiction").

jurisdiction. Recent laws, like the Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(10) and the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2703(4), expressly include allotted lands within the territorial definitions of Indian lands. And, as the United States points out, Br. of U.S. as *Amicus Curiae* at 14-15 n.11, the Burke Act of 1906, Act of May 8, 1906, 34 Stat. 183, which was a proviso added to the General Allotment Act of 1887, 25 U.S.C. §§ 348-349, strongly supports the Tribe's position here. Not only did the Burke Act expressly confirm the circumstances under which allotted lands would be subject to state jurisdiction, namely, upon the expiration of the trust period and the issuance of a fee patent, the Burke Act does not on its face exempt the allotted lands such as are involved in this case from such provisions. The clear implication is that Congress intended that the allotted lands here be treated no differently.

Essentially, the State's argument in this case reduces, as it did in *Citizen Band Potawatomi*, to its theory that Indian tribes and Indian lands in Oklahoma are somehow "different" from those elsewhere. The State's main authority for its point here are pre-*Citizen Band Potawatomi* cases or statements by this Court involving Oklahoma Indians. At the outset, it should be noted that none of these cases speak to the issue here. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943), involved the application of federal and state law to the personal property of Indian individuals located on fee

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Also unexplained is how, if at all, the reservation community test differs from the definition of dependent Indian community in Section 1151(b) as that term has been construed by the courts. *E.g.*, United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982). The United States argues, Br. of U.S. as *Amicus Curiae* at 19, that its reservation community test could apply not only to tribal members who live on allotted lands but also to members who live on land that is near a reservation but beyond the reservation boundaries. Where lands near a reservation are involved, there is already the dependent Indian community test, and such lands are precisely the type of lands to which the dependent Indian community test applies. *See, e.g., United States v. South Dakota*, 665 F.2d at 839.

lands. *Leahy v. State Treasurer*, 297 U.S. 420 (1936), involved state taxation of income earned from mineral rights on a restricted fee allotment. The allotted lands here are not merely subject to restrictions on alienation, they are in trust.

Moreover, the State's cry for an exemption for Oklahoma tribes from the principles and rules of Indian law was soundly rejected by this Court in *Citizen Band Potawatomi* and should be done so again here. It is true that Oklahoma tribes were subjected to the federal allotment policy of the late nineteenth century. But so were Indian tribes and reservations elsewhere, and the policy of allotment was halted and reversed by Congress before it ever reached its ultimate goals. *County of Yakima*, 112 S.Ct. at 686.[17]

In sum, while most, if not all, of the Indian immunity doctrine cases to date have involved principally or wholly situations on reservations or other tribal lands, *United States v. John* and *Citizen Band Potawatomi* unequivocally show that the absence of a formal reservation is not the determining factor for whether the doctrine applies. Rather, the test is whether the lands have been validly set apart for the Indians'

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[17] Throughout its Brief, the State tries to make much of the fact that allotted lands are often "scattered" amidst land that is held in fee. Such a situation did not persuade this Court in *DeCoteau* to hold other than it did with respect to the allotted lands there which were also scattered amidst a former reservation area. 420 U.S. at 429 n.3; *see also* Seymour v. Superintendent, 368 U.S. 351 (1962) (state lacks jurisdiction over Indian on non-Indian fee land located within public townsite on reservation); *and cf.* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (non-Indian fee land scattered amidst Indian land within a reservation may be subject to state zoning jurisdiction).

However, the State's characterization, State's Op. Br. at 8, of allotted lands as a "base" which Indians "tag" from time to time to avoid being subject to state jurisdiction is offensive and hardly describes the land on which Indian people live, maintain homes, and raise families. With official attitudes such as that, it is not surprising that "[t]he policy of leaving Indians free from state jurisdiction is deeply rooted in the Nation's history." *McClanahan*, 411 U.S. at 168.

use and are subject to federal protection. Cases of this Court and congressional intent as manifested in federal statutes compel the conclusion that trust allotments meet that test.

2. Allotment and Cession Acts such as the one involved here are not express congressional authorization to depart from these long-standing rules

As we have shown, the doctrine of Indian immunity from state jurisdiction applies generally to allotted lands. The burden is then on the State to show that Congress has expressly authorized an exception to this general rule. The statute upon which the State here relies is the Act of February 13, 1891, 26 Stat. 749 (hereinafter "the 1891 Act"). The 1891 Act ratified an Allotment and Cession Agreement of 1890 which the Tribe entered into with the United States pertaining to its reservation provided by the Treaty of 1867, 15 Stat. 495.[18]

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[18] An agreement with an Indian tribe ratified by an act of congress must be construed as a statute. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 560-61 (1903) (construing an act ratifying an agreement); *accord DeCoteau*, 420 U.S. at 444-49 (construing act contemporaneous with 1891 Act here); see also Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594-98 (1977) (cession agreement ratified by act of Congress presents question of congressional intent). In addition, questions of tax immunities and preemption of state law on Indian lands are essentially questions of congressional intent. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175-76 (1989).

Thus, the issue of the effect of the 1891 Act on the Indian immunity doctrine is fundamentally one of statutory construction. The question is whether Congress intended to divest the allotted lands of their immunity from state jurisdiction. If the statutory language is unclear regarding congressional intent, courts may look to the legislative history and circumstances surrounding the passage of an act to determine that intent. Other legal principles such as the doctrine of tribal sovereignty are also relevant to determining congressional intent in Indian law. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 163.

At the outset, it must be noted that nothing in the 1891 Act expressly authorizes the state jurisdiction at issue here. For example, the Burke Act of 1906, 25 U.S.C. § 349, was construed in *County of Yakima* to authorize state *ad valorem* taxes on certain land owned in fee by Indians. 112 S.Ct. at 688-93. The State nevertheless relies on the 1891 Act for its taxing and regulatory authority.

Far from authorizing state jurisdiction, laws such as the 1891 Act intended to preserve rights such as the Indian immunity doctrine notwithstanding allotment of reservation lands to Indian individuals. This conclusion follows from decisions of this Court and other courts construing similar allotment and cession acts as well as the history and the historical circumstances of such acts.

In *DeCoteau*, this Court construed the Act of March 3, 1891, 26 Stat. 989, 1036, an act which ratified an allotment and cession agreement with the Sisseton-Wahpeton Sioux Tribe. As the State concedes, State's Op. Br. at 9, the Sisseton-Wahpeton Act is very similar to the 1891 Act here. The Court in *DeCoteau* held that, notwithstanding the Act, jurisdiction over Indians on the lands allotted to individual tribal members was with the federal and tribal governments, not the state. 420 U.S. at 427-28.

In *Ahboah v. Housing Auth. of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983), the Supreme Court of Oklahoma reached the same conclusion regarding the Act of October 21, 1892, 31 Stat. 676, which ratified the Allotment and Cession Agreement with the Kiowa Tribe. The State concedes that act is similar to the 1891 Act. State's Op. Br. at 12. In *Ahboah*, the housing authority argued that Act divested the allotted lands of the Indian immunity from state jurisdiction. That "position is untenable as it ignores dispositive holdings of the United States Supreme Court." 660 P.2d at 628. The Oklahoma Supreme Court cited several cases such as *United States v. Pelican* that found no expression of congressional intent in allotment acts to divest allotted lands of their immunity. *Id.*

The State and the United States argue or imply that the effect of the 1891 Act here is different from the effect of the acts involved in *DeCoteau* and *Ahboah*. In *DeCoteau*, this

Court construed the Sisseton-Wahpeton Act to mean that the tribe ceded all its lands except those allotted to tribal members. 420 U.S. at 438-39. In *Ahboah*, the court refused to find that the Kiowa Tribe had ceded its allotted lands by its allotment and cession act. 660 P.2d at 628. In the view of the State and the United States, by the 1891 Act the Tribe here ceded its allotted lands. State's Op. Br. at 9-10; Br. of U.S. as *Amicus Curiae* at 9-10, 12-15. That attempt at distinction unnecessarily places form over substance.

The allotment and cession agreements of the Sisseton-Wahpeton Sioux and Kiowa Tribes were negotiated by the same or similar federal commissions that negotiated the agreement of the Tribe here and such agreements with many tribes in Oklahoma Territory and elsewhere. *See DeCoteau*, 420 U.S. at 439 ns.21 & 22. But, since various commissioners handled various negotiations, the drafting of particular agreements may vary somewhat from tribe to tribe, and hence this Court should refrain from overemphasizing the provisions of any one particular act.

More appropriate in determining the intent of the acts are the instructions such as those from the Secretary of the Department of the Interior to the Commissioner of Indian Affairs who in turn instructed the commissioners regarding negotiations with the Oklahoma tribes. Instructions to the Jerome Commission from the Commissioner of Indian Affairs, Record Group 48, Records of the Office of Indian Affairs, Letters Sent, 184 Land Letter Book at 164-258 (May 9, 1889), *pages 1-78 reprinted in* S. Exec. Doc. No. 78, 51st Congr., 1st Sess., 1-31 (1890), and *pages 78-94 reprinted in* B. Chapman, "Secret 'Instructions and Suggestions' to the Cherokee Commission," 26 The Chronicles of Oklahoma 449, 451-58 (1948-49).

The Jerome Commission (also known as the "Cherokee Commission") was instructed generally to negotiate with the tribes, including the Sac and Fox, for cessions of their reservations. S. Exec. Doc. No. 78 at 1-2; 26 The Chronicles of Oklahoma at 452-53 and 456. However, the Commission was also specifically instructed that:

[W]hile the Act authorizing negotiations provides for the extinguishment of the Indian title to all lands lying west of the 96th degree, no provision is made for the location and settlement elsewhere of the Indians occupying said lands. It will therefore be necessary in the event of successful negotiations with such Indians as occupy lands lying west of that degree, for the cession thereof, *to provide new reservations* suitable to the requirements of each band within the reservation now occupied by such band, *or to provide for allotments in severalty within the reservation now so occupied* or to provide new reservations, or for the allotment of lands in severalty in some other portion of the country lying west of that degree, or to provide for the removal of the Indians to lands east of said degree, and in the latter case negotiations for that purpose would be necessary with the Indians owning the lands lying east of that degree.

> It may also be said here that if the Commissioners shall find it impossible to secure a cession of all the lands lying west of the 96th degree, owned or claimed by any of the several nations or tribes, *they may negotiate for such modifications of existing reservations* and claims as the said nations or tribes may severally agree to.

26 The Chronicles of Oklahoma at 457 (emphasis added).

As the instructions show, the Jerome Commission had wide latitude to ensure that, notwithstanding the cessions, the Oklahoma tribes, including the Sac and Fox, retained some form of a land base, whether that be reservation land or allotted lands. The land base was necessary so the Indians could continue their tribal relations. The continuance of tribal relations was assumed and was intended to be protected. And, as this Court held succinctly in *DeCoteau*, "the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs." 420 U.S. at 446. In short, allotment and cession acts were intended to meet tribal needs as well as those of non-Indians.

Further, under the State's and United States' cession theory, the 1891 Act amounted to a land transaction as follows: the Tribe ceded all land within the original boundaries of its 1867 reservation except the two parcels of tribal trust land; some of the ceded land was then reserved back instantaneously to tribal members in the form of allotments. That theory is incorrect, especially when "[t]here was no interruption in the right of the Indians to occupy such lands. . . . [and] [t]he agreement . . . did not discontinue tribal relations." *Tooisgah v. United States*, 186 F.2d 93, 103 (10th Cir. 1950) (Phillips, C.J., dissenting) (construing allotment and cession act of the Kiowa Tribe discussed, *supra*, in the *Ahboah* case).

Chief Judge Phillips underscores precisely why allotted lands, though held by individual tribal members, are much more like reservations and other tribal trust lands than they are like ceded lands. Allotted lands, tribal trust lands, and reservations are all subject to Indian title and occupancy. "Ceded" means that the land was separated from the Indians, that they lost title and the right of occupancy. That does not happen with allotted lands just like it does not happen with reservation or tribal trust lands. This Court held in *United States v. Pelican* that:

> The [reservation] lands, which prior to the allotment, undoubtedly formed part of the Indian country, still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy . . . [and] when the reservation was diminished, [the allotments] were excepted from the portion restored to the public domain.

232 U.S. at 449. Indeed, that is why the Agreements are called "Allotment *and* Cession Agreements." Some land is allotted and some is ceded. But allotted land is not ceded.[19]

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[19] Even assuming *arguendo* that allotted lands were among those ceded, it does not follow that such a title transfer necessarily grants state jurisdiction over them. The United States cites no authority for its theory that the title implications of the 1891 Act in and of themselves resolve the issue of state jurisdiction. Jurisdictional issues in Indian law are first and

This Court routinely refers to "ceded" or "surplus" land as "unallotted" land. *E.g.*, *DeCoteau*, 420 U.S. at 434 and 442.

Moreover, in cases as here where, notwithstanding allotment, inherent tribal powers were not diminished, the theory that allotted lands were ceded becomes absurd. Under such a theory, tribes had little, if any, territory on which to exercise their inherent authority after allotment. It is ludicrous to think that laws such as the 1891 Act left tribes "all dressed up but with no place to go," that is, with authority but no place on which to exercise it.

Tribal sovereign interests provide a "backdrop against which the applicable [Indian law] treaties and federal statutes must be read." *McClanahan*, 411 U.S. at 172. These interests include the continuance of tribal relations as provided for in laws such as the 1891 Act, and the exercise of tribal sovereignty as discussed in *DeCoteau*, 420 U.S. at 443-444 (tribe there had a written constitution, legal codes, and courts of law); *see also The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-56 (1866) (in concluding that, absent express congressional intent otherwise, tribal members who held restricted fee allotments were entitled to the same rights, including immunities from state taxation, as those members who held their land in common, it was significant that the tribal organization had remained intact and federally recognized).

It is common ground that the Sac and Fox Nation is and always has been self-governing and federally recognized. Congress has never dissolved the tribal government. The Tribe itself has never voluntarily abandoned its government. And this Court recently recognized the sovereign status of a neighboring Oklahoma tribe in *Citizen Band Potawatomi*, 111 S.Ct. at 910.

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foremost questions of congressional intent. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. at 175-76. Tribes can have jurisdiction over and Indians can have immunities on all kinds of land, even land held in fee by non-Indians. *E.g.*, *Seymour v. Superintendent*, 368 U.S. at 354-58; *and cf.* Montana v. Crow Tribe, 484 U.S. 997 (1988), *aff'g Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987) (denying state authority to tax tribal coal mined in ceded area of reservation).

The intent of Congress that allotted lands such as are involved in this case remain subject to the Indian immunity doctrine is clear.[20] However, assuming *arguendo* that this Court should find it unclear, the Court must apply the Indian law canons of construction. *County of Yakima*, 112 S.Ct. at 693. These canons have particular force in the face of claims such as are present in this case that a statute has by implication abolished Indian tax immunities. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). In the absence of unmistakably clear intent, this Court should not assume that Congress has altered the rules of Indian law, including and especially the Indian immunity doctrine. *Id.* at 388-93.

3. Under *McClanahan*, *Moe*, and *Colville*, the State's taxes and license and registration fees are invalid

As we have shown, allotted lands generally are entitled to the Indian immunity doctrine and the allotted lands here are no exception to this rule. Hence, all of the State's attempted assertions of jurisdiction in this case must fail. This Court previously has denied similar assertions on grounds of the Indian immunity doctrine and Indian law preemption principles. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. at 165 (income tax); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 469 and 480-81 (1976); and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162-64 (1980) (motor vehicle laws). The State has not shown that Congress has authorized its asserted jurisdiction here with

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[20] In addition, those tribal members who do not reside on allotted lands may nevertheless be entitled to the application of the Indian immunity doctrine by virtue of living in a dependent Indian community. *See* 18 U.S.C. § 1151(b). To the extent the record in this case is unclear to make dependent Indian community determinations, this Court should remand to the district court for such determinations in the first instance.

unmistakably clear intent sufficient to overcome these holdings.[21] Its taxes and regulations are therefore invalid under federal law.

B. Alternatively, The State's Attempted Exercise Of Jurisdiction Here Must Fail Because It Would Infringe On The Tribe's Right To Self-Government

As the State concedes, State's Op. Br. at 10, infringement on tribal self-government is an independent barrier to the application of a state law to Indian lands or to tribal members. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 142. This Court has long recognized that state law may not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Plainly, state jurisdiction in this case would interfere with significant tribal and federal interests, including the

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[21] In *County of Yakima*, this Court emphatically rejected an approach to resolving issues of state taxation on Indians in Indian territory whereby courts would balance the interests of the tribes, states, and the federal government. "Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress." 112 S.Ct. at 693; *cf. White Mountain Apache Tribe v. Bracker*, 448 U.S. at 148 (balancing test may be applied to instances where state seeks to tax non-Indians in Indian territory).

The State nevertheless faults the Court of Appeals below for not engaging in a balancing test. State's Op. Br. at 7-8. And the United States argues that a balancing test is appropriate in cases involving allotted lands. Br. of U.S. as *Amicus Curiae* at 22-23. Under the theory that allotted lands are the same as reservations and tribal lands for jurisdictional purposes, the balancing test is as unnecessary for allotted lands as it is for those other types of Indian lands. However, assuming *arguendo* that this Court should find the balancing test is the appropriate means of resolving this case, as the United States suggests, Br. of U.S. as *Amicus Curiae* at 22-23, remand to the district court for a determination of the respective governmental interests in the first instance would be appropriate.

Indian sovereignty and immunity doctrines and the congressional goal of tribal self-government, especially the "overriding goal of encouraging tribal self-sufficiency and economic development." *Citizen Band Potawatomi*, 111 S.Ct. at 910. The Tribe here is exercising its rights to self-government – confirmed in federal law – by regulating activities on tribal lands and allotted lands. That regulation includes imposing income taxes and motor vehicle tax and regulatory laws like those the State seeks to impose on tribal members. The State concedes that the Tribe in this case may so exercise its sovereign powers. State's Op. Br. at 2, 11-12, and 15.

With respect to taxation, state authority would devastate tribal efforts to raise revenue for valid governmental services that the Tribe provides to all people, Indian and non-Indian, within its jurisdiction. As the United States argues, the state income tax:

> [Q]uite likely . . . directly burdens the administration of the respondent Tribe by increasing the cost of administering tribal affairs, in areas subject to its jurisdiction. . . . Application of the state income tax to tribal members in this case may pose a substantial risk of an infringement on the right of reservation Indians to make their own laws and be ruled by them to the extent it burdens the Tribe's sovereign right to establish relationships with tribal officers and employees on reservation land without state interference.

Br. of U.S. as *Amicus Curiae* at 22. The Tribe, too, has pointed out the irony that the state taxes would perpetuate poverty and unemployment among the Tribe by hindering its opportunities to raise revenue, provide services, and generate employment. Tribe's Br. in Support of its Motion for Summary Judgment, (W.D.Okla. filed Mar. 1, 1991) (No. CIV-90-1553 A), *reprinted in* the Jt. App. filed in this Court at 45-46.

The State errors in arguing that its taxes would impact only Indian individuals, not the Tribe. State's Op. Br. at 7 and 12. In *Bryan v. Itasca County*, where this Court struck down a state tax on the personal property of tribal members, the Court

noted that tribal revenue-raising efforts through taxation "only after the tax base had been filtered through many governmental layers of taxation" would undermine or destroy tribal governments. 426 U.S. at 488 and n.14. In *McClanahan*, the Court stated "we are far from convinced that when a State imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination." 411 U.S. at 179; *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. at 151 (although incidence of state tax was on activities of individuals, ultimate burden of tax was on tribe).[22]

III. THE COURT OF APPEALS CORRECTLY HELD THAT UNDER *SOLEM V. BARTLETT* AND OTHER CASES OF THIS COURT THE EXISTENCE OF THE ORIGINAL BOUNDARIES OF THE RESERVATION IS IRRELEVANT TO ISSUES OF JURISDICTION OVER THE TRIBAL TRUST LAND AND ALLOTTED LANDS HERE

The State argues that the boundaries of the Tribe's reservation were disestablished by the 1891 Act. State's Op. Br. at 6-10. Cases of this Court, however, hold that issues of reservation boundary disestablishment are relevant only to issues of jurisdiction over lands owned in fee by non-Indians. Hence, as a matter of law the disestablishment issue is irrelevant to this case which raises only issues of jurisdiction over activities on tribal trust land and trust allotments.

In *Solem v. Bartlett*, the Court determined whether the boundaries of a reservation had been disestablished, because the underlying issue was whether the state had jurisdiction

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[22] Regulations such as the motor vehicle licensing and registration fee laws present additional problems which this Court has recognized in terms of compliance with dual regulatory schemes. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 338 (denying state authority to regulate hunting and fishing by non-members on a reservation concurrently with tribe).

over a portion of the reservation which had been opened to settlement by non-Indians under an act of Congress. 465 U.S. at 472-81. The Court unequivocally distinguished the effect of reservation boundary disestablishment on non-Indian fee land and its effect on, *inter alia*, allotted lands.

> Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments.

Id. at 467 n.8; *accord DeCoteau*, 420 U.S. at 427 n.2 ("if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are 'Indian allotments, the Indian titles to which have not been extinguished. . . . ' ").

Solem and *DeCoteau* plainly establish that issues of the existence of reservation boundaries are relevant only to issues of jurisdiction over activities on non-Indian fee lands, and are irrelevant to issues of jurisdiction over Indian trust lands.[23] Regarding allotted lands, as noted, *supra*, in this Brief at n. 16, a conclusion otherwise would deprive statutory provisions

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[23] With respect to tribal trust and allotted lands in Oklahoma and elsewhere, this rule has been repeatedly and unequivocally followed by the Court of Appeals for the Tenth Circuit and the Supreme Court of Oklahoma. *E.g.*, Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1420-22 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 581 (1991) (allotted lands remain Indian country even when unallotted lands are ceded or when reservation is terminated); Indian Country U.S.A., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Comm'n, 829 F.2d 967, 975 n.3 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (disestablishment question is relevant only to issues of jurisdiction over non-Indian lands, not tribal lands, trust lands, and allotted lands); Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma, 618 F.2d 665 (10th Cir. 1980) (issue of reservation boundary disestablishment is irrelevant to jurisdiction over tribal trust lands and trust allotments); State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma, 711 P.2d 77, 82 (Okla. 1985) (trust allotments of tribe remain Indian country irrespective of existence of reservation boundaries); *Ahboah v. Housing Auth. of the Kiowa Tribe*, 660 P.2d at 628-29 (individual trust allotments are Indian country, whether within or without continuing reservation boundaries).

such as 18 U.S.C. § 1151(c) of any independent meaning. Section 1151(a) already makes all land within "the limits" of a reservation Indian country. Section 1151(c) is therefore undoubtedly intended to address those instances where allotted lands are not within the reservation limits. *Accord* 25 U.S.C. § 1903(10) (the Indian Child Welfare Act) and 25 U.S.C. § 2703(4) (the Indian Gaming Regulatory Act).

The State contended in *Citizen Band Potawatomi* that the issue of the existence of the reservation boundaries was relevant to the question of the application of the Indian immunity doctrine to a parcel of tribal trust land. In holding that the tribal land was subject to the immunity doctrine, this Court did not address the boundary existence issue. The clear implication is that the Court found it unnecessary to do so because it was irrelevant. The same result is warranted here. This case raises only the issue of Indian immunity on tribal and allotted trust lands. These lands concededly have been in trust continuously since they were reserved by the Treaty of 1867, 15 Stat. 495. Accordingly, this Court should disregard the State's argument to the extent the State is claiming that its jurisdiction over Indian activities on trust lands is based on the disestablishment of the reservation boundaries.[24]

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[24] Alternatively, should this Court find that the existence of the reservation boundaries is relevant to the issues raised in this case, it should remand to the district court for a determination of the merits of this issue in the first instance. In *Solem v. Bartlett*, recognizing the magnitude and importance of a finding of disestablishment, the Court cautioned against generalized, conclusory findings of disestablishment. 465 U.S. at 468-70. Rather, a finding of disestablishment requires a particularized inquiry of applicable laws as well as "pragmatic" factors such as demographics. *Id.* at 471. Such an inquiry involves factual determinations which are not well-suited to the summary judgment posture of this case.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Dated this 21st day of January, 1993.

Respectfully submitted,

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No. 92-259

In The

Supreme Court of the United States

October Term, 1992

OKLAHOMA TAX COMMISSION,

Petitioner, Cross-Respondent,

v.

SAC AND FOX NATION,

Respondent, Cross-Petitioner,

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE THE CHOCTAW NATION OF OKLAHOMA IN SUPPORT OF RESPONDENT

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This brief amicus curiae is filed, in support of Respondent, by the Choctaw Nation of Oklahoma, with the consent of both parties.

INTEREST OF THE AMICUS CURIAE

The amicus, Choctaw Nation of Oklahoma, is a federally recognized Indian tribe which occupies several thousand acres of restricted allotments and federally owned tribal trust lands situated in the southeast portion of Oklahoma. It exercises a broad range of self-governing powers, including civil and criminal jurisdiction, over these lands. It has more than 50,000 tribal members, many of whom reside and are employed on Indian country. The State of Oklahoma is presently taxing the income of tribal members earned on said lands.

The Oklahoma Tax Commission, historically the most aggressive state taxing agency in the country toward Indians, has urged this Court to treat Oklahoma Indians and Indian country differently from Indian counterparts in the rest of the country. It impliedly makes the often rejected argument that the terms reservation and Indian country are not synonymous, and that since Oklahoma Indian country is somehow different from that in the other states, the federal preemption/infringement test should be applied. Finally, the Tax Commission contends that the application of its taxes to transactions between the tribe and its members on Indian country neither infringes on tribal self-government nor is preempted by federal law. Yet, there is an absence of any showing why

either of these two barriers to state jurisdiction should not apply.

Since the members of the Choctaw Nation will be impacted by the Tax Commission's far-reaching and novel theories, amicus participates herein in support of the decision by the Court of Appeals below.

Summary of Argument

Reduced to its essentials, the Oklahoma Tax Commission's position in this case is that the terms reservation and Indian Country have a different meaning in Oklahoma than in other states; that Oklahoma Indian tribes are not "reservation tribes" but rather are "assimilated tribes"; that this then requires the preemption/infringement inquiry as to whether the State may apply its tax laws to transactions between the tribe and its employees on this new and different kind of Indian Country; that the result of the inquiry is that the Indians lose and the State wins. Because of this anomalous status, and because there are no reservations in Oklahoma, the State contends, Oklahoma tribes, in their relationship with their members, are subject to the full array of the State's taxing jurisdiction. Sustaining this position would result in the necessary finding that those Indian tribes and their members would not have the usual attributes of sovereignty and self-government as possessed by tribes in other states.

The Tax Commission is asking this Court to adopt positions that are contrary to some of the most well-established principles of federal Indian law. If accepted by this Court, there would then be two bodies of Indian

law in this country; federal Indian law which would apply in 49 states and Oklahoma Indian Law, which would apply in one. No such result is warranted in this case. A clear body of precedent from this Court and the Tenth Circuit Court of Appeals has established that the lands held in trust by the United States government for Indian tribes in Oklahoma are "reservations" and therefore "Indian Country" within the meaning of 18 U.S.C. §1511(a). In addition, the Tax Commission has advanced no persuasive argument as to why the preemption/infringement balancing test should be applied to the relations of tribal governments or their business associates and tribal members on Indian Country.

ARGUMENT

I. Whether The Original Sac And Fox Reservation Has Been Diminished Is Irrelevant To The Issue Of Whether The State May Apply Its Tax Laws To The Tribe And Its Members, On Their Remaining Indian Country

This Court does not have to decide whether the original Sac and Fox reservation in Oklahoma has been disestablished or whether its boundaries have been abolished. Whether conduct of Indians has occurred on "Indian country" is now the benchmark for allocation of federal, tribal, and state civil and criminal jurisdiction. *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 111 S.Ct. 905 (1991); *California v. Cabazon Band of Indians*, 107 S.Ct. 1083, 1087 & N.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425, 427-428 & N.2 (1971); *Indian Country, U.S.A. Inc. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) Cert.

Den. sub. nom. *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 108 S.Ct. 2870 (1988). See also F. Cohn, *Handbook of Federal Indian Law* 5-8 (1942). Congress has defined "Indian country" for purposes of determining federal criminal jurisdiction in 18 U.S.C. §1511(a) (1982) to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . " The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. §1903(10) provides:

> "Reservation means Indian country as defined in section 1151 of title 18 and any lands, not covered under such action, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;"

On September 26, 1988, the Congress passed Senate bill 555, Indian Gaming Regulatory Act, 25 U.S.C. §2701 et seq. Section 2703(4)(b) of the Act defines "Indian lands" for tribal and federal jurisdictional purposes as:

> "Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual . . . and over which an Indian tribe exercises governmental power."

This Court has designated lands as "Indian Country" where title was held in a variety of ways. *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Chavez*, 290 U.S. 357, 364 (1933); *United States v. John*, 437 U.S. 634, 649 (1978). The principal test applied by the courts is found in *Pelican* at 439, i.e. tribally-owned lands "devoted to

Indian occupancy . . . validly set apart for the use of Indians". This includes lands held in trust for a tribe by the United States. *John* at 649. This is also the test applied in at least four Circuits. *United States v. Sohappy*, 770 F.2d 816, 622-23 (9th Cir. 1985); *Langly v. Ryder*, 778 F.2d 1092, 1095 (5th Cir. 1985); *United States v. Agure*, 801 F.2d 336 (8th Cir. 1986); *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d 665, 667-668 (10th Cir. 1980); See also *State of Washington v. Sohappy*, 757 P.2d 509, 511 (Wash. 1988); and, *State ex. rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 639 (Okl. 1985).

The Petitioner apparently made the same argument to the Circuit Court in *Indian Country, U.S.A.*, supra, that it does here, i.e. the Creek Nation reservation had been disestablished. The Court there said at 975 N.3:

> "The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not . . . *Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment*. (Emphasis supplied.) See, e.g., *Solem*, 465 U.S. at 467 n.8, 104 S.Ct. at 1164 n.8; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085."

The terms "reservation" and "Indian country" are used interchangeably by the congress and the courts. The primary meaning of both terms is to describe "federally-protected Indian tribal lands". Cohen's Handbook of Federal Indian Law (R. Strickland Ed. 1982) at 35 n. 66. Thus, the terms "Indian country" and "reservation" have come to mean "those lands which congress has set apart for

tribal and federal jurisdiction". *Indian Country, U.S.A.* at 973. It should be noted that the Oklahoma Supreme Court has also recognized the importance of this classification:

> "The touchstone for allocating authority among the various governments has been the concept of 'Indian country' a legal term delineating the territorial boundaries of federal, state, and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian country have been matters of federal and tribal concern. Outside Indian country, state jurisdiction has obtained."

Ahboah v. Housing Authority of the Kiowa Tribe, 660 P.2d 625, 627 (Okl. 1983). See also *State v. Burnett*, 671 P.2d 1163 (Okl. Cr. 1983).

Finally, it has been less than two years since this Court again rejected Petitioner's argument on this point. In *Citizen Band Potawatomi*, the Court, speaking through Chief Justice Rehnquist, said that no "precedent of this Court has ever drawn the distinctions between tribal trust land and reservations that Oklahoma urges". Citing *John*, supra, the Court said "we stated that the test for determining whether that land is denominated 'trust land' or 'reservation'. Rather, we ask whether the area has been 'validly set apart for use of the Indian as such, under the superintendence of the Government'". Citing *John* at 648-649.

Petitioner cites to *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) as the basis for its proposition that Indian country is not the same as a reservation. *Bracker* does not support the State's argument. The status of tribal territory was not at issue there and, contrary to

this case, the state in *Bracker* was trying to apply its taxes to non-tribal member activities.

Notwithstanding Petitioner's persistence in urging this oft-rejected and unpersuasive argument, there is nothing in this case that merits its acceptance now.

II. The Preemption/Infringement Analysis Does Not Apply To The Conduct Of The Tribal Government And Its Members On Indian Country

Both the Petitioner and Amicus, United States, urge the Court to apply the preemption/infringement analysis to activities of Indians on Indian country for the first time in this case. The reason the Court has not applied these barriers is because there is a per se rule against taxation of Indian tribes and their members in their relationship with the tribe absent congressional consent. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, f/n 17 (1987) the Court said:

> "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule.
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> * * *
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> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates we have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest is correspondingly weak . . . "

In *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765-766 (1985) the Court citing the rule from *The Kansas*

Indians, 5 Wall 737, 18 L.Ed. 6 (1867) said regarding the criteria looked to for exemption from state taxation was:

> "[i]f the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union."

The Court then said:

> "In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the court consistently has held that it will find the Indians' exemption from state taxes only when Congress has made its intention to do so unmistakenly clear."

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), as Petitioner does here, Arizona urged this Court to apply the test in *Williams v. Lee*, 358 U.S. 217 (1959). The Court said:

> " . . . we reject the suggestion that the *Williams* test was meant to apply in this situation. It must be remembered that cases applying the *Williams* test have dealt principally with situations involving non-Indians. Id. at 179.

The Tax Commission's argument was again rejected in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-476 (1976). The Court in *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980) said it was "quite clear after Moe and McClanahan that the sales tax could

not be applied to . . . purchases by tribal members." Id. at 160. See also *Citizen Band*, supra.

The Tax Commission also argues that application of its income and motor vehicle taxes to tribal members is permissible because the State provides services, roads, schools, etc. to the public in general which includes Indians. Again, this argument meets resistance from *McClanahan and Moe* where the Court expressly rejected the assimilationist theory to tax the tribal members where they continued to maintain their tribal relationship. In *Moe* the Court said:

> "Noting this Court's rejection of a substantially identical argument in *McClanahan*, see 411 U.S. at 173, and n. 12, 36 L.Ed.2d 129, 93 S.Ct.1257, and the fact that the Tribe, like the Navajos, had not abandoned it tribal organization, the District Court could not accept the State's proposition that the tribal members 'are now so completely integrated with the non-Indians . . . that there is no longer any reason to accord them different treatment than other citizens,' 392 F.Supp. at 1315. In view of the District Court's findings, we agree that there is no basis for distinguishing *McClanahan* on this ground." 425 U.S. at 476.

The Tax Commission has not asserted that the Sac and Fox Nation has "abandoned it tribal organization" nor is there any evidence that its members do not maintain their relationship with that organization so as to accord them any different treatment than those tribal members in *McClanahan* and *Moe*.

CONCLUSION

Amicus respectfully prays the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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